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IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY C. NEWLAND, WARDEN, *Petitioner,*

v.

MOBASSA BOYD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), a state court reasonably applies *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by declining to undertake comparative analysis of challenged and non-challenged jurors for the first time on appeal.

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QUESTION PRESENTED

Whether, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), a state court reasonably applies *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by declining to undertake comparative analysis of challenged and non-challenged jurors for the first time on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

No. ____________

ANTHONY C. NEWLAND, WARDEN, *Petitioner,*

v.

MOBASSA BOYD, *Respondent.*

Anthony C. Newland, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The second amended opinion of the United States Court of Appeals for the Ninth Circuit, issued upon the denial of a timely petition for rehearing en banc, is reported at 467 F.3d 1139. App. 106a-132a. The first amended opinion of the court of appeals is reported at 455 F.3d 897. *Id.* 81a-105a. The original opinion is reported at 393 F.3d 1008. *Id.* 63a-80a. The order of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus is unreported. *Id.* 17a-62a. The opinion of the California Court of Appeal affirming the judgment of conviction and its orders denying respondent's motions to supplement the record with a complete transcript of voir dire are unreported. *Id.* 7a-15a.

STATEMENT OF JURISDICTION

The court of appeals filed an opinion denying respondent's petition for writ of habeas corpus on December 29, 2004. App. 63a-80a. On June 26, 2006, the court of appeals filed an amended opinion granting the petition for writ of habeas corpus and denying respondent's petition for rehearing and petition for rehearing en banc. *Id.* 81a-105a. By further amendment of the opinion on October 26, 2006, the court of appeals substituted as relief a conditional writ of habeas corpus. Under its terms, the writ would issue unless the State provides respondent, without charge, a complete voir dire transcript within a reasonable period of time, after which respondent may renew in the district court his claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals on that date also denied the Warden's petition for rehearing and petition for rehearing en banc. *Id.* 106a-132a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 2254(d)(1) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. Respondent Mobassa Boyd was charged in the Alameda County, California Superior Court with unlawful firearms possession. App. 7a. At respondent's trial, the prosecutor used

his third peremptory strike to remove prospective juror Shirley Brown, an African-American. *Id.* 8a-9a. Respondent's counsel moved to dismiss the panel of prospective venire persons under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). *Id.* 9a. Under California law, a *Wheeler* motion also serves as an objection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). See *People* v. *Yeoman*, 31 Cal. 4th 93, 117-18, 72 P.3d 1166, 1187-88, 2 Cal. Rptr. 3d 186, 210-11 (2003). In attempting to meet his initial burden of making out a prima facie case of illegal discrimination, counsel for respondent offered only the following statement:

> I have taken a look at the panel. It looks like we may have only two more African-Americans in the panel total. The only other African-American who was potentially a juror in this particular case was excused for cause based upon a non-disclosure of some prior arrests. There was nothing that I could glean in the responses of Ms. Brown during the course of her voir dire examination by the court or by [the prosecutor] Mr. Hora or by myself which would lead me to believe that there was sort have [*sic*] any tangible reasons whereby someone might excuse her as being a potentially partial juror, and so I'm interjecting a *Wheeler* motion at this point.

App. 9a. Defense counsel made no mention of the prosecutor's questioning of other jurors, or of any similarities or dissimilarities between prospective juror Brown and other jurors.

The prosecutor declined to comment on respondent's objection. The trial court found that respondent had failed to establish a prima facie case. *Id.* 9a-10a. Defense counsel made no further objection under *Wheeler/Batson*, and made no record of the final composition of the jury. Respondent was convicted and sentenced to prison. *Id.* 10a.

2. On appeal to the California Court of Appeal, respondent

filed three motions to augment the record and to obtain a free copy of the entire jury voir dire transcript, arguing that it was necessary to conduct comparative juror analysis (by which he intended a comparison of the challenged minority juror to the non-challenged jurors), in order to show error in the trial court's denial of his *Batson* claim. In light of *People* v. *Landry*, 49 Cal. App. 4th 785, 788-93, 56 Cal. Rptr. 2d 824, 825-28 (1996) (holding there is no right to the entire voir dire transcript in order to conduct comparative juror analysis for the first time on appeal), the court of appeal concluded that respondent's request for a transcript of the voir dire of other jurors did not comply with a local rule of court requiring that motions to augment the transcript must "establish with some certainty how the requested material may be useful on appeal."[1] App. 1a-5a. Instead, the appellate court provided respondent with an augmented transcript of the voir dire of juror Brown. Respondent filed a petition in the California Supreme Court seeking a writ of mandate directing the appellate court to augment the record with the entire voir dire transcript. That petition was denied. *Id.* 6a.

On the merits, the California Court of Appeal concluded that the trial court properly found that respondent had failed to establish a prima facie case under either *Wheeler* or *Batson* for the challenge of juror Brown and affirmed the judgment. App. 12a-14a. The court of appeal explained that respondent had "offered no basis for his motion other than the fact that Brown was African-American and [respondent] could not see any reason for excusing her," *id.* 12a, and that he had "not point[ed] to anything in the prosecutor's line of questioning that suggests racial motive. To the contrary, the prosecutor engaged Brown in substantial voir dire before excusing her." *Id.* 12a. The state appellate court further noted that "Brown's responses to several of the prosecutor's questions suggest that legitimate reasons may exist for the exercise of the peremptory challenge." *Id.* It cited the prosecutor's remark during voir dire regarding Brown's hesitant response about whether missing work would be a distraction. *Id.* 12a. The state appellate court further noted, based on Brown's responses to the prosecutor's voir dire questions, that she "appeared to be holding something back when asked about her personal experiences with the justice system," and the possibility she might adopt "an unfavorable view" of a prosecution witness based on a past experience. *Id.* 12a. The court of appeal found that respondent "clearly did not establish a prima facie case of group discrimination. . . ." *Id.* 13a. The California Supreme Court denied review on March 1, 2000. *Id.* 16a.[2]

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[1] See former First District Court of Appeal Local Rule 6(d) (now First District Court of Appeal Local Rule 7(d), effective October 16, 2006).

3. Respondent filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the district court in December 2000. In August 2003, the district court rejected respondent's argument that *Batson* constituted "a holding requiring the use of comparative juror analysis" and noted that "the Ninth Circuit has not interpreted *Batson* as requiring such analysis." App. 30a-31a. Observing that this Court had upheld a federal statute requiring indigent federal habeas corpus petitioners to make a showing of need and non-frivolousness in order to obtain a free transcript, see *United States* v. *MacCollom*, 426 U.S. 317, 322 (1976), and that *Batson* allows discretion in determining "what evidence is 'relevant' in resolving" claims, App. 31a, the district court ruled that no "clearly established Federal law" prohibited the States from enacting similar limitations, *Id.* 38a-39a. In light of *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994), which had noted the different approaches on this score of the California Supreme Court and the Ninth Circuit Court of Appeals, the district court further ruled that it was neither contrary to nor an unreasonable application of clearly

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[2] Respondent filed various other petitions seeking writs from the Alameda County Superior Court, California Court of Appeal and California Supreme Court based upon claims that are not germane to this petition. Those petitions were denied.

established Federal law for the California court to refrain from conducting comparative juror analysis for the first time on appeal. Therefore, the district court concluded, respondent was unable to establish his need for a transcript of the entire voir dire. App. 38a.

4. On appeal, the Ninth Circuit initially affirmed the judgment of the district court, holding that "*Batson* does not clearly establish a requirement of comparative juror analysis on appeal." App. 75a; see *id.* 75a-76a ("In summary, Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal."). In 2006, however, the Ninth Circuit issued an amended opinion, reaching the opposite conclusion and granting a conditional writ of habeas corpus on the *Batson* claim. App. 106a-132a. The Ninth Circuit found that, "in light of [respondent's] plausible *Batson* claim, the California appellate courts' denial of [respondent's] request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law." *Id.* 129a.

In its amended opinion, the panel expressed its view that, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), its original opinion had "misunderstood *Batson* and that, without an entire voir dire transcript, the California appellate courts could not have considered the circumstances surrounding the contested strike, could not have evaluated the potential inference of racial bias, and therefore could not properly have found that [respondent] failed to establish a prima facie case." App. 117a. The panel rejected the Warden's argument that *Miller-El II* was inapplicable to the instant case under *Teague* v. *Lane*, 489 U.S. 288 (1989); in the court of appeals' view, both *Johnson* and *Miller-El II* were mere clarifications of *Batson*, not new rules. *Id.* 119a.[3] The Ninth Circuit found that respondent had "raised at least a plausible *Batson* claim [in the trial court] and that contextual analysis is therefore appropriate," *id.* 121a. It ruled that "*Miller-El II* made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims. . . ." *Id.* 118a.

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[3] The Ninth Circuit analyzed the retroactivity issue only under *Teague v. Lane*, 489 U.S. 288 (1989). App. 119a-121a. The Warden's

> Because we hold that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim, we also must conclude that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis.

App. 126a-127a.

5. On November 2, 2006, the Ninth Circuit granted the Warden's motion for a ninety-day stay of the mandate pending the filing of this petition for certiorari.

REASONS FOR GRANTING WRIT

The Ninth Circuit's Erroneous Opinion Creates An Intolerable Conflict With The California Supreme Court And A Split Among The Federal Courts Of Appeals On An Important Question Implicating AEDPA, Federalism, And The Proper Administration Of This Court's *Batson* Procedure.

Introduction.

1. In reversing itself in this habeas corpus case, the Ninth

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opposition to rehearing argued principally that *Miller-El II* did not clearly establish a rule compelling comparative juror analysis for purposes of 28 U.S.C. § 2254(d), and alternatively that such a rule applied in this case also would violate *Teague*.

Circuit held that "clearly established law" requires that a State defendant, having failed to bring the evidence to the attention of the trial court, must be allowed to litigate for the first time in his state appeal the question of whether "comparative analysis" of jurors not subjected to peremptory challenge by the prosecutor might show them to be so similar to a minority juror challenged by the prosecutor as to give rise to a retroactive inference of racial discrimination under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But, especially when their decisions are reviewed with the deference required by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the trial court cannot be condemned for any failure to consider the import of latent "comparative analyses"of jurors not called to its attention by the defense, and the state appellate court cannot be condemned for declining to consider such comparisons for the first time on appeal. This Court's *Batson* jurisprudence neither requires nor "clearly establishes" that state courts must undertake such comparisons sua sponte, without any identification of the pertinent comparisons by the defense at the time of trial. Certiorari should be granted for at least three reasons.

First, the new "comparative analysis" rule adopted by the Ninth Circuit in its habeas corpus decision squarely conflicts with the California Supreme Court's interpretation of *Batson* and threatens to continue to collide with the state supreme court's teaching to the lower California courts. Second, the Ninth Circuit rule also conflicts with that of the Eleventh Circuit. Third, the Ninth Circuit's new rule is inconsistent with the role assigned to the trial judge in this Court's *Batson* jurisprudence; and its retroactive enforcement of the rule represents a failure to abide by the limitations imposed on federal habeas corpus courts by Congress in AEDPA.

2. California courts, reasonably and properly, seek to root out improper bias in the exercise of peremptory challenges against prospective venire-persons by reviewing the record before the trial court when it ruled. They do not adjudicate factual

inferences purportedly derivable from a cold transcript of the voir dire of prospective venirepersons not the subject of the objector's *Batson* claim unless those inferences were brought to the attention and litigated before the factfinder, the trial judge. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1318, 71 P.3d 270, 280, 1 Cal. Rptr. 3d 1, 13 (2003), rev'd on another ground in *Johnson* v. *California*, 545 U.S. 162 (2005) ("We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case."). California's courts nevertheless are open to comparative analysis and make *Batson* rulings in light of such evidence—when offered to the trial court for evaluation in the first instance. See *People* v. *Johnson*, 30 Cal. 4th at 1322-23, 71 P.3d at 282-83, 1 Cal. Rptr. 3d at 16-17. Where not raised by the defense and litigated at trial, however, the California Supreme Court considers comparative analysis to be both unrealistic in terms of jury selection dynamics and "highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected." *People* v. *Johnson*, 47 Cal. 3d 1194, 1220-21, 767 P.2d 1047, 1056-57, 255 Cal. Rptr. 569, 578-79 (1989). It is unfair to expect the trial judge to discern which of potentially myriad comparisons are the most pertinent ones.

A. The Ninth Circuit's Erroneous Rule Conflicts With The California Supreme Court Rule That Continues To Govern California Courts

This case represents an intolerable split between the Ninth Circuit and the California Supreme Court on the important question of whether the defendant must first present "comparative juror analysis" to the trial court before urging it on appeal or in post-conviction proceedings. See *People* v. *Johnson*, 30 Cal.4th at 1325, 71 P.3d at 285, 1 Cal. Rptr. 3d at

19. The conflict, first, unnecessarily jeopardizes the finality of California convictions, including death penalty judgments long since final in state court but only slowly working their way through the federal habeas process.

Moreover, the Ninth Circuit's ruling confronts California with a continuing dilemma. State appellate courts, in the wake of the California Supreme Court's rulings on this question, might well refrain from conducting comparative analysis offered for the first time on appeal.[4] In habeas corpus, however, the federal courts will subject those judgments to the intrusive "comparative analysis" review mandated by the Ninth Circuit in the decision below.

This split of authority should be resolved now. Certainly, the California rule should be vindicated. But, even if California truly were obliged to conduct comparative juror analysis for the first time on appeal, then nothing can be gained from allowing more *Batson* claims to be decided in state court under California's rule when such review is superseded by the federal courts of this circuit, which now will conduct such analysis in federal habeas corpus proceedings.

B. The Ninth Circuit's Decision Reflects An Irreconcilable Split Of Authority Among The Federal Courts

In addition to the Ninth Circuit–California Supreme Court conflict, the decision below also gives rise to a similar conflict among the federal courts of appeals. Here, the Ninth Circuit held that a plausible *Batson* objection requires comparative juror analysis by the California Court of Appeal even though such analysis would have necessitated the appellate court's drawing factual inferences concerning matters in voir dire that formed no part of respondent's showing and were never at issue in the *Batson* hearing in the trial court. App. 123a-126a. By contrast, the Eleventh Circuit holds that such comparative juror analysis is not required for the first time on appeal. *Hightower* v. *Terry*, 459 F.3d 1067, 1070-72 (11th Cir. 2006) (federal habeas court is limited to considering the evidentiary record developed in state trial court and the trial court's ruling); *Atwater* v. *Crosby*, 451 F.3d 799, 807 (11th Cir. 2006) ("Although Atwater presented comparative evidence of discrimination to the post-conviction courts and in his petition for habeas relief, conspicuously absent from the trial record is some argument or evidence of comparability at the time that the *Batson* challenge was made to refute the prosecutor's reason for the strike. Here, then, '[t]he lesson to claimants of *Batson* violations and prosecutors is that comparisons must be made between the black jurors removed from jury service and the white jurors remaining for service.' Without this comparison evidence, Atwater's *Batson* claim fails.") (internal citations omitted).

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[4] See *People* v. *Williams*, 40 Cal. 4th 287, ___, 148 P.3d 47, ___, 52 Cal. Rptr. 3d 268, 289 (2006) (citing to *Miller-El-II*, court assumes without deciding appellate courts are obliged to undertake comparative juror analysis offered for the first time on appeal); *People* v. *Guerra*, 37 Cal. 4th 1067, 1106, 40 Cal. Rptr. 3d 118, 152, 155 (2006).

In both *Hightower*, 459 F.3d 1067, and *Atwater*, 451 F.3d 799, the Eleventh Circuit decided that this Court's decision in *Miller-El II* does not stand for the proposition that a defendant must be allowed to make a postconviction comparative juror analysis where the defendant had failed to do so before the trial court acting as the factfinder. See *Hightower*, 459 F.3d at 1069; *Atwater*, 451 F.3d at 807 ("'defendant bears the burden of convincing the district court that the proffered reasons are pretextual by introducing evidence of comparability'") (citation omitted).

In essence, the Eleventh Circuit, like California, has applied to comparative juror analysis the well-established rule that appellants cannot rely on factual inferences drawn from evidence not considered by the factfinder. The existing split between federal circuits on the use of comparative juror analysis in *Batson* cases is significant and requires review.

C. *Batson* Does Not Clearly Establish A Requirement That Comparative Juror Analysis Must Be Conducted When Asserted For The First Time On Appeal

Certiorari review is necessary, also, because the Ninth Circuit's decision failed to abide by the limitations on habeas corpus enacted by Congress in 28 U.S.C. § 2254(d). In rejecting California's reasonable understanding of *Batson*, the Ninth Circuit in this case failed to base its ruling on "clearly established Federal law" as determined by this Court—as 28 U.S.C. § 2254(d) requires.

"Clearly established" federal law refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). Nothing in *Batson*, the only relevant Supreme Court case existing at the time the state court decided this case, compels the States to use comparative juror analysis for the first time on appeal to determine whether a defendant made a prima facie case of racially discriminatory motive for the exercise of a peremptory challenge. Nor, despite what the Ninth Circuit stated, does *Miller-El II*, 545 U.S. 162, mandate comparative juror analysis. And, far from lending support to the court of appeals' holding, *Johnson* v. *California*, 545 U.S. 162, established only that a prima facie case under *Batson* does not require the objector to show in the trial court that it is more likely than not the other party's peremptory challenges, if unexplained, are based on impermissible group bias, but need only establish an inference of discrimination. In sum, nothing in *Batson* or its progeny "clearly established" the comparative analysis rule the Ninth Circuit applied retroactively to award habeas relief to respondent in this case.

1. In *Batson* v. *Kentucky*, 476 U.S. 79, 94, this Court held that a prima facie showing of discriminatory purpose in the exercise of a peremptory challenge could be demonstrated from "the totality of circumstances." See also *id.* at 96 ("all relevant circumstances"). This Court gave several examples of factors

the trial court should take into account in determining whether the defendant had made out a prima facie case, including evidence of a pattern of strikes against particular jurors and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97. These examples were "merely illustrative." *Id.* *Batson* itself said nothing that mandated the States to conduct comparative juror analysis whenever objection is made to the challenge of prospective venirepersons at trial. Similarly, *Batson* imposed no requirement that such analysis be conducted for the first time on appeal. Indeed, the Court in *Batson* expressly declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99; see David D. Hopper, Note, *Batson* v. *Kentucky* and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?, 74 Va. L.Rev. 811, 817 (1988) ("The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test.").

2. Central to the Ninth Circuit's conclusion is its view that "*Miller-El II* fits within the *Batson* framework, which provides that 'the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.'" App. 120a. But, as already noted, the reference in *Batson* was illustrative of the types of evidence that might be relevant to the *trial court*. 476 U.S. at 97. And, in any event, *Miller-El II* does not require the trial court to undertake comparative analysis sua sponte upon a *Batson* objection. Even if that illustration might denote an actual rule, it cannot attain a status greater than that of dicta when applied to appellate courts. Dicta does not amount to "clearly established Federal law" under 28 U.S.C. § 2254(d). *Williams* v. *Taylor*, 529 U.S. at 412. To whatever extent *Miller-El II* itself arguably might be read to require comparative juror analysis for the first time on appeal—or, for that matter, at step one of a *Batson* hearing in the trial court—any such reading of that decision plainly amounts to an "extension" of the *Batson*

language.

Such issues were not before this Court in *Miller-El-II*, where the trial predated *Batson*. The state appellate court remanded to the trial judge for a *Batson* hearing since defendant's trial motion objecting to the prosecutor's excusal of jurors had been decided under the by-then disapproved standard of *Swain* v. *Alabama*, 380 U.S. 202 (1965). *Miller-El II*, 545 U.S. at 236. At the *Batson* hearing, the trial judge had considerable evidence including the entire voir dire and statements of reasons from a prosecutor. *Id.* at 236, 241 nn.1-2, 264 n. 38. In finding the prosecution had truthfully stated nondiscriminatory reasons for striking minority jurors, the trial judge specifically noted the result of a comparison of jurors struck by the prosecution with those not struck by the prosecution. *Miller-El II*, Joint Appendix Vol. II of II, 2004 WL 2891870 at *929, ¶¶ 6, 9. The state appellate court did not attempt factual findings on appeal and instead found "'ample support' in the voir dire record" for the trial judge's findings. *Miller-El II*, 545 U.S. at 237.

The case then came to this Court on review of a denial of habeas corpus under 28 U.S.C. § 2254, "following the Texas trial court's prior determination of the fact that the States's race-neutral explanations were true" and, consequently, this Court devoted its analysis to the *state trial court's* factual findings. *Miller-El II*, 545 U.S. at 240. Aside from the fact that comparative juror analysis was before the trial court consistent with Texas law, see *Young* v. *State*, 826 S.W.2d 141, 150-51 (Tex.Crim.App. 1991), and both sides actually employed comparative juror analysis at the evidentiary hearing conducted by the trial judge, the State had no objection when Miller-El asked the federal district court to augment that record to consider other evidence, including juror questionnaires and juror information cards. See *Miller-El II*, 545 U.S. at 241 & n.2; *id.* at 256 n.15; see *People* v. *Johnson*, 30 Cal. 4th at 1321, 71 P.3d at 282, 1 Cal. Rptr. 3d at 16 (*Miller-El II* "merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court").

Miller-El II, moreover, involved the use of comparative juror analysis at the *third* step of the *Batson* analysis, after the defendant had made a prima facie showing and the prosecutor was ordered to explain his challenges, not at the first step at issue here, where the sole question was whether respondent had established a prima facie case of discrimination in the trial court. See *People* v. *Gray*, 37 Cal. 4th 168, 189, 118 P.3d 496, 511, 33 Cal. Rptr. 3d 451, 468-69 (2005) (noting *Miller-El II* did not consider whether appellate court must conduct a comparative juror analysis in first instance, when objector failed to make prima facie showing of discrimination, or whether appellate court must conduct a comparative juror analysis for first time on appeal, when objector failed to do so at trial). The court of appeal's decision that *Batson* clearly established a requirement of comparative juror analysis for the first time on appeal misreads *Miller-El II*.

3. At one time, this point was sufficiently clear that the Ninth Circuit itself understood *Batson* as not requiring comparative juror analysis on appeal. See *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994) ("The U. S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right."). Consistent with that understanding, the Ninth Circuit's original opinion in this case found that "Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal," App. 75a-76a, and ventured that *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*), decided after the finality of respondent's judgment on appeal, had not changed this fact, *id.* 75a ("Because *Miller-El [I]* did not decide anything about how to establish a prima facie case, or about how to examine a prima facie case on appeal, it cannot stand for the proposition that comparative juror analysis is required to be done for the first time on appeal.").

Now, however, the Ninth Circuit views *Batson* as "clearly establishing" that a state appellate court, in evaluating whether the defendant made out a prima facie case of racial discrimination, must consider the defendant's proffered comparative juror analysis, by examining the voir dire questions and answers of peremptorily-challenged minority jurors against those of unchallenged non-minority jurors. Further, in the Ninth Circuit's view, this must be done even where, as in the present case, the defendant failed to bring those matters to the attention of the trial court in the *Batson* hearing. *Batson*'s "clearly established" law on this point is triggered, according to the court of appeals, whenever the defendant lodges what the federal court characterizes after the fact as at least a minimally "plausible" objection to the challenge of a minority juror.

The Ninth Circuit is wrong. Its approach constitutes a new rule in violation of *Teague* v. *Lane*, 489 U.S. 288.[5] Moreover, under AEDPA, no clearly established rule exists where the relevant precedents by this Court "exhibit a lack of clarity," *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003), or are "at best, ambiguous," *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003), or require a habeas court to "extend a rationale before it can apply to the facts at hand," *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004). The fact that the Ninth Circuit in this case originally found nothing in *Batson* compelling comparative juror analysis for the first time on appeal, then rested its ultimate judgment upon the purported "clarification" it gleaned from *Miller-El II*, a decision coming five years after the California courts completed review of respondent's *Batson* claim, pointedly illustrates that comparative juror analysis for the first time on appeal was not a rule clearly established in *Batson*.

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[5] Respondent's judgment became final for purposes of retroactivity analysis on June 1, 2000. See *Beard* v. *Banks*, 542 U.S. 406, 411 (2004).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 24, 2007

Respectfully submitted,

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GLENN R. PRUDEN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
MOBASSA KENYATTA BOYD,
Defendant and Appellant.

Court of Appeal No. A083484
Alameda Co. Super. Ct. No. C132404

BY THE COURT:

Appellant's "application to augment the record on appeal . . ." etc. filed on October 13, 1998, is granted in part and denied in part as follows:

Request number 1 is granted to the extent appellant seeks a reporter's transcript of defense counsel's motion for a mistrial that was made on May 26, 1998, and defense counsel's motion pursuant to *People* v. *Wheeler* (1978) 22 Cal.3d 258, that was made on that same date. Appellant's request for all juror voir dire occurring on May 26, 1998, is denied because it fails to comply with First District Local rule 6(d) and controlling legal authority. (See *People v. Landry*, (1996) 49 Cal.App.4th 785,788-793.)

Requests number 2 and 3, seeking reporter's transcripts of all voir dire occurring on May 21, 1998, and May 20, 1998, respectively, are denied because they fail to comply with First District Local rule 6(d) and controlling legal authority. (See *People v. Landry, supra,* 49 Cal.App.4th 788-793.)

Request number 4 is granted. The trial court is directed to prepare and to forward to this court *only* an original and two copies of the reporter's transcript of appellant's motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, that was apparently heard on April 17, 1998. The court will then forward a copy to appellant's counsel.

Request number 5 is granted. The trial court is ordered to forward to ths court People's exhibit number 4. The court will then provide a copy to both counsel on appeal if appropriate.

All of the above materials shall be filed with this court within thirty (30) days. Appellant's opening brief shall be served and filed within thirty (30) days of the date the materials are filed with this court.

Date OCT 16 1998 JONES, P.J P.J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
MOBASSA KENYATTA BOYD,
Defendant and Appellant.

FILED
Court of Appeal-First App. Dist.
Dec 21, 1998
RON D. BARROW, Clerk
BY________________
Deputy

Court of Appeal No. A083484
Alameda Co. Super. Ct. No.C132404

BY THE COURT:

Appellant's "renewed application to augment the record on appeal" etc. filed on December 14, 1998, is granted in part and denied in part as follows:

The application is granted to the extent appellant seeks to augment the record with the voir dire of prospective juror Brown who was the subject of appellant's motion pursuant to *People* v. *Wheeler* (1978) 22 Cal.3d 258. (See RT 5/26/98, pp. 1-2.) The application is denied to the extent appellant seeks the voir dire of the remaining jurors who were not the subject of appellant's *Wheeler* motion. (See *People* v. *Landry* (1996) 49 Cal.App.4th 785, 788-793 .)

The augmented transcript shall be filed with this court within thirty (30) days of this order. Appellant's opening brief shall be served and filed within thirty (30) days of the date the augmented transcript is filed with this court.

Date Dec 21 1998 STEVENS, J. P.J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED
Court of Appeal-First App.Dist.
APR 30 1999
RON D. BARROW, CLERK
BY____________________
Deputy

The People,
Plaintiff and Respondent,

A083484

v.

MOBASSA BOYD

Defendant and Appellant.

(Alameda County
Superior Ct. No. 132404[)]

BY THE COURT:

Appellant's renewed motion to augment the record on appeal, filed herein on April 27, 1999, is denied.

Respondent's brief shall be served and filed on or before May 14, 1999.

Date APR 30 1999 JONES, P.J. P.J.

S078973

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
JULY 21 1999
Robert Wandruff Clerk
S. CASADOS
Deputy

MOBASSA BOYD, Petitioner

v.

FIRST DISTRICT COURT OF APPEAL DIVISION FIVE,
Respondent
THE PEOPLE, Real Party in Interest

Petition for writ of mandate DENIED.

George
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED
Court of Appeal-First App. Dist.
DEC 27 1999
RON D. BARROW, CLERK
BY____________________
Deputy

THE PEOPLE,	**A083484**
Plaintiff and Respondent,	
v.	**(Alameda County**
MOBASSA K. BOYD	**Super.Ct. No. 132404)**
Defendant and Appellant.	

Following a trial by jury, appellant Mobassa K. Boyd was convicted of violations of Penal Code sections 12020, subdivision (a)[1] (possession of a sawed-off shotgun) and 12021, subdivision (e) (possession of a firearm, having been adjudicated a ward of the court for commission of a felony).

Appellant contends: (I) the trial court erred in denying a motion to discharge the jury panel under *People* v. *Wheeler* (1978) 22 Cal.3d.258 and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), due to the prosecutor's exclusion of an African-American juror during voir dire; and (2) he was improperly convicted of section 12020, because section 12020 is a lesser included offense of section 12021 as charged in the information. We affirm.

---

[1] Unless otherwise indicated, all further section references are to the Penal Code.

I. FACTS AND PROCEDURAL HISTORY

As a juvenile in 1991, appellant had been adjudicated a ward of the court for the commission of a felony under Welfare and Institutions Code section 707 (attempted murder).

On the morning of February 5, 1998, appellant, now an adult, visited his grandmother, Lilla Downs (Downs). Appellant informed Downs he had a gun in his backpack and offered to show it to her. Appellant also told Downs there was a warrant out for his arrest and he would not be taken alive. Downs was frightened and went to the home of her son, Limmie Boyd (Limmie), from which appellant's parole officer was called. Two officers responded to Limmie's house and several telephone calls were placed to Downs' home. There was no answer. Downs returned to her home to find appellant still present. After Downs again left her home, officers conducted a surveillance of the house. Several hours later, Oakland police officers established a perimeter around the house and attempted to encourage appellant to surrender. However, appellant refused to come out. Eventually, officers forced entry and found appellant in the living room where he was taken into custody.

A search of the premises located appellant's backpack in the front bedroom. Inside the backpack was a small bag containing several shotgun shells. From underneath the bed was recovered a loaded sawed-off shotgun, which was determined not to belong to Downs. Officers also found an unloaded shotgun underneath the living room couch, However, that shotgun did belong to Downs and did not form the basis for any charges.

In addition to charging appellant with violating sections 12021, subdivision (e) and 12020, the information alleged that appellant had suffered a prior felony conviction, within the meaning of sections 667, subdivision (e) (1) and 1170.12, subdivision (c) (1). Appellant stipulated to the juvenile adjudication, and trial of the special allegation was bifurcated.

Following the trial court's general questions to the panel, both court and counsel conducted voir dire of prospective juror S.

Brown (Brown). Like appellant, Brown was African-American. In response to questioning, Brown informed that she presently worked as a coordinator for a federally funded home energy program. She stated that serving on the jury would cause some loss of wages and cause her clients to go without service. Although Brown offered that missing work would not be a distraction, the prosecutor commented that she sounded "a little hesitant." Brown had worked previously for the City of Oakland for 25 years counseling senior citizens and low-income residents. When asked whether she would call the police to report someone she loved (as had Downs), Brown replied that it would depend on the circumstances. She believed that the criminal justice system was "fair in some cases; depends on the case." Although Brown denied having any personal experiences with the criminal justice system that she viewed as unfair, the prosecutor noted that he sensed there was something more to her answer than what she disclosed. In all other respects, Brown's responses were unremarkable.

The prosecutor exercised his third peremptory challenge in excusing Brown. Appellant's trial counsel promptly moved to dismiss the panel under *Wheeler*, making the following offer of proof:

> "I have taken a look at the panel. It looks like we may have only two more African-Americans in the panel in total. The only other African-American who was potentially a juror in this particular case was excused for cause based upon a non-disclosure of some prior arrests. There was nothing that I could glean in the responses of Ms. Brown during the course of her voir dire examination by the court or by [the prosecutor] or by myself which would lead me to believe that there was sort of [sic] any tangible reasons whereby someone might excuse her as being a potentially partial juror, and so I'm interjecting a Wheeler motion at this point." (Underscoring in original.)

The prosecutor was not asked to state his reasons for excusing this prospective juror, as the trial court concluded that appellant had failed to establish a prima facie case of group discrimination. The record does not disclose the final composition of the panel. The jury found appellant guilty on all counts as charged. In a separate court trial, the prior felony allegation was found true. A motion to strike this special allegation was later denied, and the trial court imposed a sentence comprised of the upper term of three years for violation of section 12021, subdivision (e) (count one), doubled pursuant to section 1170.12, subdivision (c)(1), for a total term of six years in the Department of Corrections. The court imposed but stayed a six year term for violation of section 12020, subdivision (a) (count two) pursuant to section 654. Appellant timely filed a notice of appeal.

II. DISCUSSION

A. CLAIM OF *WHEELER-BATSON* ERROR DURING JURY SELECTION

Appellant first contends the trial court committed *Wheeler-Batson* error in ruling that appellant failed to establish a prima facie case of discrimination.

"In *People v. Wheeler, supra*, 22 Cal.3d 258, the California Supreme Court held that peremptory challenges could not be constitutionally utilized by a prosecutor to exclude members of a cognizable group on the basis of group bias alone. [Citation.] In *Batson v. Kentucky*, [*supra*,] 476 U.S. 79, 96, the United States Supreme Court accepted a similar proposition. To implement these holdings, both courts adopted a like procedure. A defendant alleging an unconstitutional exclusion of some group from the jury must first make a prima facie showing of such exclusion. . . . Once a prima facie case has been established, the burden shifts to the prosecution to demonstrate a neutral explanation for the challenge. [Citation.]" (*People v. Christopher* (1991) 1 Cal.App.4th 666, 669-670, fn. omitted.)

1. Standard of Review

The trial court's determination that a defendant failed to establish a prima facie case is reviewed for substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197.) We view the trial court's ruling with "'considerable deference'" on appeal, because such determinations are made upon the trial judge's personal observations. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 .) Thus, we must affirm if there appear "'grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*Ibid.*)

2. Prima Facie Case

A prima facie case of discrimination under *Wheeler* is shown by (1) making as complete a record of the circumstances as feasible; (2) establishing that the persons excluded are members of a cognizable group; and (3) showing from the circumstances of the case a *"strong likelihood* that such persons are being challenged because of their group association." (*People v. Turner* (1994) 8 Cal.4th 137, 164, quoting *Howard, supra*, 1 Cal.4th at pp. 1153-1154, italics in original.)

At issue here is whether appellant demonstrated a "strong likelihood" that the peremptory challenge of Brown was due to her race alone. To make such a showing, a defendant must do more than merely claim that a juror is African-American. (*Alvarez, supra*, 14 Cal.4th at p. 198; *Howard, supra*, 1 Cal.4th at p. 1154; *Christopher, supra*, 1 Cal.App.4th at p. 673 .) The defendant must do more than show that the excused juror appeared impartial or even favorable to the prosecution. (*Turner, supra*, 8 Cal.4th at p. 167.) "Rather, a defendant should underscore 'other relevant circumstances, such as prospective jurors' characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions. . . .' [citation]." (*People v. Bernard* (1994) 27 Cal.App.4th 458, 466.) Demonstration of a prima facie case is ". . . most often done by establishing a pattern of strikes eliminating most or all members of the group. [Citations.] Other factors to be considered include the nature of the questioning by the prosecutor, the racial or ethnic background of the defendant and the victim, and the similarity of the challenged jurors based on characteristics other than group membership. [Citations.]" (*Christopher, supra*, 1 Cal.App.4t.h at p. 670.)

Substantial evidence supports the trial court's conclusion that appellant failed to establish a prima facie case. Appellant offered no basis for his motion other than the fact that Brown was African-American and appellant could not see any reason for excusing her. As shown above, those allegations are insufficient. Appellant does not point to anything in the prosecutor's line of questioning that suggests a racial motive. To the contrary, the prosecutor engaged Brown in substantial voir dire before excusing her. At least up to the point of her excusal, no other peremptory challenges had been exercised against African-Americans, and other African-Americans remained on the panel.

Furthermore, Brown's responses to several of the prosecutor's questions suggest that legitimate reasons may exist for the exercise of the peremptory challenge. For example, contained within this record are the prosecutor's comments that Brown sounded hesitant in responding to the question of whether missing work would be a distraction, and the observation that the juror appeared to be holding something back when asked about her personal experiences with the justice system. Also, it is unclear whether Brown would adopt an unfavorable view of prosecution witness Downs, in light of her response that it would "depend[] on the case" whether she would turn in someone she loved to the police. In short, appellant failed to demonstrate, and the record does not disclose, a "strong likelihood" of racial motivation for the exercise of the peremptory challenge.

Appellant suggests that the "strong likelihood" test of *Howard* is more rigorous than that permitted under federal cases, such as *Batson*.[2] He further contends that *Batson* directed courts to decide whether a defendant established a prima facie case of discriminatory peremptory challenges by reference to disparate treatment cases under Title VII of the Civil Rights Act of 1964. Indeed, he relies primarily on a case decided under Title VII-*Furnco Construction Corp. v. Waters* (1978) 43 8 U.S. 567–rather than on cases dealing with the jury selection process. However, appellant misreads *Batson*. *Batson* discussed Title VII in three footnotes, but it did not hold that the standard for a prima facie showing in Title VII cases applies in cases involving discriminatory jury selection. (*Batson, supra*, 476 U.S. at 94, fn. 18, 96, fn. 19, 98, fn. 21.)

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[2] Appellant did not explicitly object under *Batson*. For purposes of argument, we accept appellant's contention that he implicitly objected on *Batson* grounds when he explicitly objected on the grounds of *Wheeler*.

Moreover, any theoretical difference between the application of *Wheeler* and *Batson* has no relevance under the circumstances of this case. Appellant clearly did not establish a prima facie case of group discrimination, even under federal precedent. (*U S. v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902, cert. denied (1994) 513 U.S. 89 1 [no prima facie case where prosecution challenged the only African-American juror and defendant contended there was no reason to disqualify the juror].)[3]

B. CONVICTIONS UNDER SECTIONS 12021 AND 12020

Appellant contends that he was improperly convicted of section 12021, subdivision (e) (possession of a firearm by a ward of the court) and Penal Code section 12020, subdivision (a) (possession of a sawed-off shotgun), because section 12020 is a necessarily included offense of section 12021. A defendant may not be convicted of both a greater offense and a lesser-included offense in the same proceeding.

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[3] In a footnote, appellant asserts that he has not been able to brief this appeal adequately because he was not permitted to augment the record with a reporter's transcript of the entire jury voir dire. This issue was the subject of three motions by appellant to this court, seeking to augment the record with the reporter's transcript of the *entire* jury voir dire. In each instance, appellant failed to identify with any specificity the proposed usefulness of the balance of the voir dire on appeal (see Ct. App., First App. Dist., Augmentation of Record, rule 6(d) [West's Cal. Rules of Court (1996) pp. 89-90). Nor has he established that his ability to prosecute this appeal has been prejudiced. Appellant's petition for review to our Supreme Court was denied. (*Alvarez, supra*, 14 Cal.4th at p. 196, fn. 8.)

Appellant concedes that section 12020 is not a necessarily included offense of section 12021 as a matter of legal definition, because its elements are not subsumed within the legal elements of section 12021 as defined by statute. He contends instead that section 12020 is a necessarily included offense of section 12021 based on the accusatory pleading, because both counts in the information referred to the same sawed-off shotgun.

While it is true that, in some circumstances, an offense may be a lesser included offense based solely on the charges of the accusatory pleading, "only a *statutorily* lesser included offense is subject to the bar against multiple convictions in the same proceeding." (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-166, italics added.) As the appellate court in *Scheidt* explained, ". . . conviction of both crimes advances the differing legislative purposes behind each." *(Id.* at p. 171.) Section 12020 is directed to the danger posed by a particular weapon (here a sawed-off shotgun), while section 12021 is directed to the hazard of a certain person (here a former ward of the court) possessing a firearm. *(Id.* at p. 171.) To immunize appellant from conviction for a violation of section 12020 simply because the information specified the same firearm (sawed-off shotgun), ". . . would be irrational and would frustrate the strong legislative purpose behind both statutes." *(Id.* at p. 171.) We agree with the reasoning of *Scheidt* and reach a similar conclusion here.

II. DISPOSITION

The judgment of conviction is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

HANING, J.

People v, *Boyd* (AO83484)

FIRST APPELLATE DISTRICT, DIVISION FIVE
No. A083484
SO85444

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT
FILED
Mar - 1 2000
Frederick K. Ohlrich Clerk
Deputy

THE PEOPLE, Respondent

v.

MOBASSA K. BOYD, Appellant

Appellant's petition for review DENIED.

GEORGE
Chief Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FILED
AUG 08 2003
Richard W. Weiking
Clerk, U.S. District Court
Northern District of California
San Jose

MOBASSA BOYD, NO. C-00-21287 RMW
Petitioner,
v.
ANTHONY NEWLAND, Warden, Order Denying Petition for
Respondent. Writ of Habeas Corpus
[Re Docket Nos. 1, 25, 26, 32]

Petitioner Mobassa Boyd seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner claims that: (1) the prosecution's peremptory strike of an African-American prospective juror violated petitioner's rights under Batson v. Kentucky, 476 U.S. 79 (1986); (2) the state court's refusal to provide petitioner with a record adequate to present his Batson claim violated his rights to due process, equal protection, and effective assistance of counsel; (3) his due process rights were violated when he was convicted of both a primary offense and a lesser-included offense; (4) the prosecution committed misconduct by threatening the key prosecution witness; (5) the evidence was insufficient to support his convictions; (6) he received ineffective assistance of trial counsel; and (7) the use of his prior juvenile adjudication to support a sentence enhancement was unconstitutional, because the use violated Supreme Court precedent and because his guilty plea to the juvenile offense was not knowing and intelligent. For the reasons set forth below, the court denies the petition.

I. BACKGROUND

A. Underlying Offense

On the morning of February 5, 1998, petitioner visited his grandmother, Lilla Downs (Downs). Petitioner informed Downs he had a gun in his backpack and offered to show it to her. He also told her there was a warrant out for his arrest and he would not be taken alive. Downs was frightened and went to the home of her son, Limmie Boyd (Limmie), from which petitioner's probation officer was called. Two officers responded to Limmie's house, and there was no answer to several telephone calls placed to Downs' home. Downs returned to her home to find petitioner still present. After Downs again left her home, officers conducted a surveillance of the house. Several hours later, Oakland police officers surrounded the house and encouraged the petitioner to surrender. However, petitioner refused to come out. Eventually officers forced entry and found petitioner in the living room, where he was taken into custody.

Petitioner's backpack was found in the front bedroom. There was a small bag containing several shotgun shells inside the backpack. An unloaded sawed-off shotgun, later determined as not belonging to Downs, was recovered from underneath the bed. Officers also found an unloaded shotgun underneath the living room couch. However, that shotgun did belong to Downs and did not form the basis for any charges.

On June 2, 1998, a jury convicted petitioner of unlawful possession of a firearm, having suffered a juvenile adjudication for a felony (Cal. Penal Code § 12021 (e)), and unlawful possession of a sawed-off shotgun (Cal. Penal Code § 12020(a)). Petitioner stipulated to the juvenile adjudication, and trial of the special allegation was bifurcated. After a bench trial, the court found that petitioner suffered a prior juvenile adjudication for attempted murder, a serious felony within the meaning of Cal. Penal Code sections 667(e)(1) and 1170.12(c)(l). The trial court imposed a sentence comprised of the upper term of three years for violation of § 12021(e), doubled pursuant to § 1170.12(c)(l), for a total tern of six years in the Department of Corrections. In addition, the court imposed but stayed a six year term for violation of § 12020(a) pursuant to § 654.

B. California State Court Proceedings

During jury voir dire, the prosecution exercised one of its peremptory challenges to dismiss an African-American jury candidate. [4] Petitioner's trial counsel moved to dismiss the entire jury panel on a Wheeler/Batson[5] theory, arguing that the prosecutor's peremptory challenge was racially motivated. The trial court denied petitioner's motion on the ground that there was no prima facie showing that the potential juror was excused based on her race. See Cal.Ct.App. Op. at 3.

On April 12, 1999, petitioner challenged his conviction on direct appeal. The bases for his direct appeal were the Wheeler/Batson argument and the argument that petitioner was convicted of both a primary offense and a lesser-included offense. During the pendency of the direct appeal, petitioner filed three separate requests for augmentation of the record to include the entire jury voir dire transcript, which petitioner maintained was necessary to fully present his Wheeler/Batson argument. The court of appeal denied each motion for augmentation because petitioner did not "establish with some certainty how the requested materials may be useful on appeal" under First District Local Rule 6(d) and because of People v.

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[4] Petitioner is African-American.

[5] People v. Wheeler, 22 Cal. 3d 258 (1978); Batson v. Kentucky, 476 U.S. 79 (1986).

Landry, 49 Cal.App.4th 785, 788-93 (1996). Petitioner then sought a writ of mandate from the California Supreme Court ordering the court of appeal to augment the record. The writ of mandate was denied. Thereafter, the court of appeal affirmed petitioner's underlying conviction.

On January 21, 2000, petitioner sought review of his conviction by the California Supreme Court, which was denied on March 1, 2000.

From February 2000 to August 2000, petitioner filed habeas petitions in California's Superior Court, Court of Appeal, and Supreme Court. Each habeas petition was denied.

C. Federal District Court Proceedings

Petitioner filed a pro se habeas petition in this court on December 27, 2000, and the court issued an order to show cause on March 8, 2001. On March 14, 2001, the court issued an order granting petitioner's motion for appointment of counsel. On March 19, 2001, petitioner filed a notice of voluntary dismissal. Then, on March 26, 2001, petitioner filed a motion to strike the voluntary dismissal and a motion to amend the petition, but the court did not receive the motions until May 8, 2001. In the interim, the court issued an order vacating its March 14, 2001 order for appointment of counsel. On June 29, 2001, having received petitioner's motion to strike the voluntary dismissal and motion to amend the petition, the court issued an order granting the motion to strike and denying petitioner's motion to amend without prejudice. The court's order additionally stayed all further proceedings in the case until 30 days after counsel was appointed.

Petitioner filed his first amended petition for writ of habeas corpus on January 4, 2002. Respondent filed an answer and opposition to the petition on March 5, 2002. Petitioner filed his traverse on April 8, 2002.

Petitioner raises seven claims. First, the prosecution's peremptory strike of an African-American prospective juror violated petitioner's rights under Batson v. Kentucky, 476 U.S. 79 (1986). Second, the state court's refusal to provide petitioner with a record adequate to present his Batson claim violated his rights to due process, equal protection, and effective assistance of counsel. Third, petitioner's due process rights were violated when he was convicted of both a primary offense, unlawful possession of a firearm after having suffered a juvenile adjudication for a felony, and a lesser-included offense, unlawful possession of a sawed-off shotgun. Fourth, the prosecution committed misconduct by threatening the key prosecution witness, petitioner's grandmother. Fifth, the evidence was insufficient to support the conviction. Sixth, petitioner received ineffective assistance of trial counsel because counsel did not interview his grandmother or discover that her testimony was coerced. Seventh, the use of his prior juvenile adjudication to support a sentence enhancement was unconstitutional because the use violated Apprendi v. New Jersey, 530 U.S. 466 (2000), and because his guilty plea to the juvenile offense was not knowing and intelligent.

Respondent contests each of petitioner's claims. First, respondent argues petitioner failed to make a prima facie showing of group discrimination under Batson. Second, the state court's refusal to provide petitioner with a more complete record to present his Batson claim did not violate any of his rights because the holding was not contrary to or an unreasonable application of United States Supreme Court precedent. Third, petitioner's due process rights were not violated because he was not convicted of both a primary offense and a lesser-included offense, and because the claim is procedurally barred. Respondent argues that petitioner's prosecution misconduct, insufficient evidence, ineffective assistance of trial counsel claims are procedurally barred, and that petitioner's evidence does not support these three claims. Finally, respondent argues that the use of petitioner's prior juvenile adjudication to support a sentence enhancement was constitutional.

II. ANALYSIS

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner alleges he is in custody in violation of his due process rights under the Fifth and Fourteenth Amendments.

However, this court may not grant the petition with respect to any claim that was adjudicated on the merits in State court unless the State court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Williams v. Taylor, 529 U.S. 362, 402-03 (2000).

In Williams v. Taylor, the Supreme Court held that a federal court's power to grant a state prisoner's petition for a writ of habeas corpus is constrained. 529 U.S. at 412.[6] The Court stated that a decision is "contrary to" if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court arrives at a different result from

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[6] The court notes that petitioner erroneously cites Justice Stevens' opinion in Part II as the Supreme Court's holding in Williams. (Traverse at 3-4.) In Williams, Justice Stevens delivered the Court's opinion with respect to Parts I, III, and IV. Justice O'Connor delivered the Court's opinion with respect to Part II. As a result of citing from Justice Stevens' opinion, petitioner argues that the Supreme Court has "graphically demonstrated that AEDPA allows federal courts to grant habeas relief where they believe, in their independent judgment, that it is appropriate." (Id. at 4.) However, the Court held the opposite. See Williams, 529 U.S. at 412 ("In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.").

Supreme Court precedent using facts materially indistinguishable from that precedent. Id. at 412-13. The Court also stated that a decision is an "unreasonable application" if the state court identifies the correct governing legal principle from the Supreme Court's cases but unreasonably applies it to the facts of the petitioner's case. Id. at 413. Moreover, a federal district court is prohibited from granting a habeas petition based on its independent conclusion that the state court's decision is incorrect:

> [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411.

A. Petitioner Has Not Made a Prima Facie Showing to Support His Batson Claim

Petitioner argues that his right to equal protection was violated because the prosecutor used a peremptory challenge to excuse S. Brown (Brown), an African-American prospective juror because of her race Petitioner further contends that the state court, relying on People v. Wheeler, 22 Cal.3d 258 (1978), applied a test contrary to the Supreme Court's holding in Batson v. Kentucky, 476 U.S. 79 (1986). Moreover, petitioner argues that he has met the prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Although petitioner's argument that California applied a test contrary to Supreme Court precedent is correct, petitioner has not made a prima-facie showing of discrimination.

1. The Batson Standard

The Supreme Court in Batson held that the State may not use its peremptory challenges to strike African-American prospective jurors on the basis of race without violating the Constitution. 476 U.S. at 89. The petitioner must first establish a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Id. at 96-97. Once the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) in question. Id. at 97. The trial court will then determine if the petitioner has established purposeful discrimination. Id. at 98.

To make a prima facie case of purposeful discrimination in selection of the jury, the petitioner must first establish that he is a member of a cognizable racial group. Id. at 96. He must also establish that the prosecutor has exercised peremptory challenges to remove members of the petitioner's race from the venire. Id. Finally, the petitioner must show that "these facts and any other relevant circumstances raise an inference that the prosecutor used [his peremptory strikes] to exclude the veniremen from the petit jury on account of their race." Id. The trial court determines whether the petitioner has made a prima facie showing by considering "all the relevant circumstances." Id.

The Ninth Circuit has recently held that the trial court is obligated to complete all the steps of the Batson process only after the petitioner makes a prima facie showing of discriminatory use of peremptory strikes. *See* United States v. Alanis, No. 02-30194, slip. op. at 9371 (9th Cir. July 10, 2003) ("The district court properly conducted steps one and two of the three-step *Batson* process after defense counsel's original objection. . . . We agree with Alanis that the court was obliged to proceed to the third step . . . .").

2. The Wheeler Standard

The California Supreme Court held in People v. Wheeler that using a peremptory strike to remove a prospective juror for the lone reason of group bias violated the California Constitution. 22 Cal.3d 258, 276-77 (1978). The California Supreme Court stated that the petitioner must first make a prima facie case of discrimination before the burden shifted to the other party to enunciate a justification for the juror's removal other than group bias. Id. at 280, 281. The trial court then determined the merit of the respondent's justification. Id. at 282.

In order to make a prima facie case of discrimination, the Wheeler standard requires the petitioner to show a "strong likelihood" that the peremptory strike was used on the basis of group association. Id. at 280. However, the California Supreme Court in Wheeler also stated that a "reasonable inference" would suffice. Id. at 281. As a result, there has been confusion over the level of rigor required by Wheeler for a prima facie showing of discrimination, and whether that level of rigor is contrary to Batson. See Lewis v. Lewis, 321 F.3d 824, 835 (9th Cir. 2003); Cooperwood v. Cambra, 245 F.3d 1042, 1047 (9th Cir. 2001); Wade v. Terhune, 202 F.3d 1190, 1197 (9th Cir. 2000). The California Supreme Court in People v. Box announced that "in California, a 'strong likelihood' means a 'reasonable inference.'" 23 Cal. 4th 1153, 1188 n.7 (2000). Moreover, the California Supreme Court has recently announced in People v. Johnson that "Wheeler's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with Batson." 30 Cal.4th 1302, 1318 (2003). However, Box and Johnson were decided after the court of appeal reviewed petitioner's habeas corpus claim. Therefore, this court must determine what the court of appeals meant when it applied the

Wheeler standard to the present case.[7]

The court of appeals rejected without analysis the petitioner's argument that the "strong likelihood" test was stricter than Batson. In fact, the court of appeals stated that "any theoretical differences between the application of Wheeler and Batson has no relevance under the circumstances of this case." Cal. Ct. App. Op. at 6. Moreover, the court of appeals neither utilized nor mentioned the "reasonable inference" language. See Fernandez v. Roe, 286 F.3d 1073, 1077 (holding that the California Court of Appeal use of Wheeler's strong likelihood language was contrary to Supreme Court precedent because, among other reasons, it "did not mention . . . [Batson's] more lenient 'inference' test."). Thus, it appears that the court of appeal used the "strong likelihood" language to mean a more demanding standard than what Batson requires, despite the California Supreme Court's argument in Johnson that the Wheeler standard has always complied with Batson. Because the court of appeal, relying on Wheeler, required the petitioner to raise a "strong likelihood" of discrimination rather than just "an inference," the court of appeal applied a rule contrary to Batson. See Cooperwood, 245 F.3d at 1046; Wade, 202 F.3d at 1197. As a result, this court will review the state court's determination of this issue de novo.

3. De Novo Review

Under de novo review, this court nevertheless denies petitioner's claim that he made a prima facie showing as required by Batson.

A party exercising a peremptory strike may have any reason, which also includes no reason, apparent or otherwise, to strike a juror. See Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . .") (citation omitted). Batson limits peremptory strikes by stating that the party's use of a peremptory strike, whether with or without any reason, must not be motivated by race. Id. Moreover, under Batson, no reason need be given until petitioner demonstrates a prima facie case of purposeful discrimination based on the facts and circumstances of the case. Id. at 97.

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[7] This court recognizes that the California Court of Appeal analyzed this issue using federal precedent. See Cal. Ct. App. Op. at 6. However, the analysis is very brief because the court primarily relied upon Wheeler to review the petitioner's claim of jury discrimination. Accordingly, this court will regard the court of appeal's opinion as depending mainly on Wheeler for this issue.

Petitioner argues that there was "no *apparent* reason" for striking the juror. (Traverse at 13.) (emphasis original). However, petitioner's statement is insufficient to demonstrate a prima facie case of discrimination because petitioner cannot argue that no apparent reason to excuse an African-American prospective juror equals a discriminatory reason to strike that juror. Moreover, petitioner's argument fails as a matter of law because petitioner has failed to put forth facts and circumstances showing purposeful discrimination other than the statement that there was no apparent reason to strike the juror. See Batson, 476 U.S. at 97.

Essentially, petitioner argues that an inference of discrimination is created when a juror who happens to be African-American is struck. As a matter of law, this is insufficient to fulfill petitioner's burden of showing a prima facie case. See Tolbert v. Gomez, 190 F.3d 985, 988 (9th Cir. 1999) ("[The striking of one juror of a cognizable racial group does not by itself raise an inference of discriminatory purpose.") (citing United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)); see also Wade v. Terhune, 202 F.2d 1190, 1198 (9th Cir. 2000) ("[The fact that the juror was the one Black member of the venire does not, in itself, raise an inference of discrimination.") (citation and internal quotation marks omitted).[8]

Petitioner also argues that an inference of discrimination was created because only two of four African-American prospective jurors remained after Brown was excused. However, the African-American juror other than Brown was struck for cause based upon non-disclosure of some prior arrests. (Rep's Augmented Tr. at 11 .) In addition, Brown's challenge was the prosecutor's third peremptory strike overall, and at that moment, the only peremptory strike against an African-American. As a matter of law, this is insufficient to establish circumstances of discrimination for petitioner's prima facie case. See Fernandez v. Roe, 286 F.2d 1073, 1078 (9th Cir. 2002) ("Two challenges out of two [minority] venirepersons are not always enough to establish a prima facie case. Because the numbers are so small (and, hence, potentially unreliable), two such challenges, standing alone, may not be sufficient to support an inference of discrimination."); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) ("It is important to emphasize that the challenge of two minority jurors does not, in and of itself, create a prima facie case of purposeful discrimination."); see also United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), rev'd on other grounds, Huddleston v. United States, 485 U.S. 681 (1988) ("We conclude that striking just two jurors does not constitute such a pattern indicating a systematic exclusion of blacks. ").

Finally, the state court of appeals found there were several legitimate reasons, independent of race, for the prosecutor's exercise of the peremptory challenge.[9] These reasons include the prosecutor's comments that the excused juror sounded hesitant in responding to the question of whether missing work would be a distraction; the prosecutor's observation that the juror appeared to be holding something back when asked about her personal experience with the justice system; and the juror's potential bias against the prosecution's witness, who is petitioner's grandmother, because of the juror's equivocal response as to whether she would report someone she loved to the police. Cal. Ct. App. Op. at 5-6.

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[8] In this respect, this court's review of petitioner's Batson claim is similar to the court of appeal's review. See Cal. Ct. App. Op, at 6.

[9] Therefore, the court of appeal's decision is also based on a reasonable "determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S. C. § 2254(d)(2).

Under the circumstances presented, petitioner has not made a prima facie showing that the prosecutor had a discriminatory purpose in challenging the juror.[10] Accordingly, petitioner's claim that his right to .equal protection was violated by the prosecutor's peremptory challenge is denied.

B. The State Court Could Properly Deny Petitioner's Request for the Entire Voir Dire Record

Petitioner filed three separate requests for augmentation of the record to include the entire jury voir dire transcript. Petitioner argued that the entire record was necessary in order for him to conduct comparative juror analysis to support his Wheeler/Batson claim. The court of appeal granted petitioner's request for the voir dire transcript for Brown, the juror in question. However, the court denied each motion for augmentation of the entire jury voir dire transcript because the request failed to comply with First District Local Rule 6(d) (motions to augment the transcript must "establish with some certainty how the requested materials may be useful on appeal") and controlling legal authority in People v. Landry, 49 Cal. App.

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[10] Because the petitioner has failed to make a prima facie showing of discriminatory use of peremptory strikes, the court is not required to complete the second and third steps of Batson. See United States v. Alanis, No. 02-30194, slip. op, at 9373 (9th Cir. July 10, 2003) (stating that the district court erred by failing to proceed to Batson's third step after the defendant made a prima facie showing that the prosecutor exercised peremptory challenges on the basis of [a protected class] and the prosecution offered a [neutral] basis for striking each potential juror).

4th 785, 788-93 (1996). The California Supreme Court denied petitioner's writ of mandate to order the court of appeal to augment the record.

Petitioner argues that the state court's denial of his request for the entire voir dire record denied him a record adequate to present his Wheeler/Batson claim because he was unable to conduct comparative juror analysis.[11] Petitioner asserts that as a result, he was deprived of his rights to due process, equal protection, and effective assistance of counsel. This court finds that petitioner's claim fails because the California court did not apply a rule that was contrary to or an unreasonable application of clearly established Supreme Court precedent.

1. California's rejection of comparative juror analysis is not contrary to or an unreasonable application of United States Supreme Court precedent

Petitioner argues that because he has raised federal equal protection, due process, and effective assistance of counsel claims in his state court briefs, the state court was required to apply federal law. (See Am. Pet. at 11 .) Consequently, petitioner asserts, the state court was required to conduct comparative juror analysis because "the federal law that applied to petitioner's federal claims requires comparative juror analysis." (See id.) Petitioner asserts that the Supreme Court in Batson rendered a holding requiring the use of comparative juror analysis and that the Ninth Circuit has interpreted Batson to require comparative juror analysis. (See Am. Pet. at 12; Traverse at 16.) Petitioner's argument fails because the Supreme Court in Batson did not render a holding on comparative juror analysis and the Ninth Circuit has not interpreted Batson as requiring such analysis.

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[11] Petitioner also filed a motion in this court to expand the record to support his habeas petitioner. Petitioner argued that the entire voir dire transcript was relevant to the adjudication of the underlying habeas petitioner [sic]. This court denied petitioner's motion. Petitioner now also argues that this court's ruling on the motion to expand the record was incorrect. (Am. Pet. at 11-13.)

Batson holds that peremptory challenges used to strike African-American prospective jurors on the basis of race violates the Constitution. 476 U.S. 79, 89 (1986). However, Batson does not mention comparative juror analysis or whether a court is required to consider the entire voir dire transcript in resolving a Wheeler/Batson claim. Rather, the Supreme Court left trial courts discretion in implementing Batson:

> In deciding whether the defendants [sic] has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Id. at 96-97. Given this discretion to determine what evidence is "relevant" in resolving Wheeler/Batson claims, the California Supreme Court and the Ninth Circuit have adopted difference [sic] approaches. Moreover, they have done so because they have recognized that there is no Supreme Court precedent that contradicts either of their approaches. See Burks v. Borg, 27 F.3d 1424, 1427 (9th Cir. 1994) ("The U.S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right."); People v. Landry, 49 Cal. App. 4th 785, 791 (1996) ("No contrary United States Supreme Court decision exists on this issue . . . .").

Thus, the Ninth Circuit has embraced comparative juror analysis. See McClain v. Prunty 217 F.3d 1209,1220-21 (9th Cir. 2000) ("'A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.'") (quoting Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997)). Although the Ninth Circuit affirmatively uses comparative juror analysis, it has not cited Batson as requiring comparative juror analysis. See e.g. McClain, 217 F.3d at 1220-21 (stating that a comparative juror analysis is a "well-established tool" for determining discrimination, but citing Turner and not Batson for support); Turner, 121 F.3d at 1248 (stating the same but not citing Batson for support of that statement).

In contrast, the California Supreme Court has soundly rejected comparative juror analysis. People v. Johnson, 30 Cal. 4th 1302, 1324-25 (2003); People v. Johnson, 47 Cal. 3d 1194, 1220-21(1989); see People v. Turner, 8 Cal. 4th 137, 169 (stating that California has previously rejected procedures that place undue emphasis on comparative juror analysis); People v. Montiel 5 Cal.4th 877, 909 (stating that "an appellate court will not reassess good faith by conducting its own comparative juror analysis"); see also People v. Box, 23 Cal. 4th 1153, 1190 (2000) (reaffirming rejection of comparative juror analysis). Moreover, the California Supreme Court has recently stated in People v. Johnson, 30 Cal. 4th 1302 (2003), that "[w]e see nothing in the [U.S. Supreme Court's] decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal. Accordingly, we maintain our longstanding practice [of not utilizing comparative juror analysis.]" 30 Cal.4th at 1324; see, e.g., People v. Johnson, 47 Cal. 3d at 1221 ("[T]he very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar."). Therefore, under California law, the court of appeal was not allowed to conduct a "comparative juror analysis" in resolving petitioner's Wheeler/Batson claim.

Accordingly, the court of appeals in People v. Landry recognized that it was bound by the California Supreme Court's rejection of comparative juror analysis. 49 Cal.App.4th 785, 791 (1996) ("[O]ur Supreme Court has indicated that for purposes of both Wheeler and [Batson], an appellate court should not conduct such an inquiry on its own. [Citations.] . . . [W]e are bound by our high court's interpretation of federal law."). As a result, it was unnecessary for the Landry court to expand the record to include the entire voir dire transcript. In petitioner's case, the court of appeals similarly recognized that it was bound by the holding in People v. Landry.

Because Batson did not render a holding regarding comparative juror analysis, there is no "clearly established Federal law" addressing that issue.[12] Consequently, it cannot be said that the California Supreme Court's rejection of such analysis is contrary to or an unreasonable application clearly established federal law. Moreover, this court cannot require the state courts to conduct comparative juror analysis merely because the state court's rule is inconsistent with Ninth Circuit case law. See Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000) ("However, we may not, of course, reverse a state court decision simply because it is inconsistent with a rule established by the Ninth Circuit."); Duhaime v. Ducharme, 200

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[12] Petitioner cites Miller-El v. Cockrell, 123 S.Ct. 1029 (2003) as supplemental authority relevant to Batson. (Letter from Pet'r to Ct. on April 9,2002.) Again, petitioner misapplies Williams. This court is bound only by "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362,412 (2000). The Court in Miller-El defines the minimum standard for a prisoner to obtain a certificate of appealability. 123 S .Ct. at 1034. Thus, the Miller-El Court's use of comparative analysis to determine Miller-El's Batson claim is not binding on this court because it is dicta. See Williams, 529 U.S. at 412. Even if Miller-El required comparative juror analysis, such a holding was not Supreme Court precedent existing at the time the state court rendered its decision. See id.

F.3d 597, 600 (9th Cir. 2000) ("This court . . . has held that [in a habeas corpus petition] ... it can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue."). Thus, petitioner's argument that California is required to conduct comparative juror analysis fails as a matter of law.

2. California's denial of petitioner's request for the entire juror voir dire transcript is is not contrary to or an unreasonable application of United States Supreme Court precedent

Petitioner argues that an indigent defendant is allowed to receive a free and complete transcript of the proceedings below for appeal because "clearly established Supreme Court case law holds that no justification of any kind is required." (Am. Pet. at 10; see Traverse at 16.) As a result, petitioner asserts he is entitled to the entire juror voir dire transcript in order to conduct comparative juror analysis and to look for any error the transcript may contain, even if he knows of no error. (See Am. Pet. at 10.) Again, petitioner's argument fails because, despite his statement to the contrary, there is no clearly established Supreme Court precedent on this issue.

A survey of the relevant case law on the issue of providing transcripts to indigent petitioners reveals the Supreme Court's clear position that the State cannot discriminate against convicted defendants on account of their poverty. Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality); see Eskridge v. Wash. State Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) (per curiam). "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Griffin, 35 1 U.S. at 19; see Draper v. Washington, 372 U.S. 487, 496 (1963) ("In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds . . . .").

However, the Supreme Court has been equally clear in establishing that a State does *not* have to purchase a transcript in *every* case where a defendant is indigent. See Eskridge, 357 U.S. at 216 ("We do not hold that a State must furnish a transcript in every case involving an indigent defendant."); Griffin, 351 U.S. at 20 ("We do not hold, however, that [a State] must purchase a stenographer's transcript in every case where a defendant cannot buy it."). Instead, the Court has held that the State must provide a sufficiently complete transcript of prior proceedings to an indigent defendant when that transcript is needed for an "effective" appeal, Britt v. North Carolina, 404 U.S. 226, 227 (1971) (footnote omitted); Mayer v. City of Chicago, 404 U.S. 189, 195 (1971); Coppedge v. United States, 369 U.S. 438,446 (1962). The Court has further identified two factors relevant to the determination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." Britt, 404 U.S. at 227 (footnote omitted).

a. The value of the transcript to the defendant in connection with the appeal for which it is sought

The Supreme Court has not clearly established the requirements for determining "value." It stated in Wade v. Wilson,

> [petitioner argues that . . . because 'it may not be possible to pinpoint * * * alleged errors in the absence of a transcript,' petitioner was entitled to a transcript for use in petitioning for habeas corpus even though he did not specify what errors he claimed in his conviction. To pass on this contention at this time would necessitate our decision whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief. *This is a question of first*

> *impression which need not be reached at this stage of the case.*

396 U.S. 282, 286 (1970) (emphasis added). In subsequent cases the Court still has not taken the opportunity to determine such circumstances.

Rather, the Court in Britt stated that the "outer limits" of a requiring a State to provide indigent prisoners the basic tools of an adequate appeal were "not clear." 404 U.S. at 227. The Court conceded that "it can ordinarily be assumed that a transcript of a prior mistrial would be valuable." Id. at 228. Subsequent cases have also assumed the value of a transcript for certain purposes. See Williams v. Oklahoma City, 395 U.S. 458, 458-459 (1969) (per curiam) (transcript needed to perfect appeal); Gardner v. California, 393 U.S. 367, 371 (1969) (transcript needed for a second habeas corpus hearing); Roberts v. LaVallee, 389 U.S. 40, 41 (1967) (transcript of preliminary hearing needed for use at trial); Long v. Dist. Court of Iowa, Lee County, 385 U.S. 192, 192-194 (1966) (per curiam) (transcript needed for state habeas corpus petitioner to appeal denial of relief). However, such assumptions are dicta, which is not binding on this court when reviewing state habeas corpus petitions. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

Moreover, the Court has not clearly established whether or not States can require indigent defendants to make a showing of need before defendants can obtain a transcript. Petitioner cites from MacCollom v. United States, 511 F.2d 1116 (9th Cir. 1974), for the argument that

> the clear trend of recent cases-Hardy, Gardner, and Britt-has been away from the requirement that, before an indigent can obtain a free transcript of prior proceedings, he must make a showing of need tailored to the facts of a particular case. For [the Ninth Circuit] to rest the denial to [the defendant] of a trial transcript on the ground that he failed to specify precisely why he needed it would be to

> revive a rule rapidly losing favor before the Supreme Court.

(Am. Pet. at 9 (quoting 511 F.2d at 1121).) Petitioner also cites to the Court's remarks in that it was troubled by requiring a petitioner to make showing of need tailored to the facts of their case before he could obtain a transcript. See 404 U.S. at 228. Moreover, petitioner argues that the Supreme Court in Bounds v. Smith, 430 U.S. 8 17 (1 977), and Justice Goldberg's concurring opinion in Hardy v. United States, 375 U.S. 277 (1964), "explain" the reason that no showing is required. (Am. Pet. at 9.)

However, petitioner fails to note that the Ninth Circuit's opinion in MacCollom was reversed by the Supreme Court, which *upheld* a federal statute requiring indigent federal habeas corpus petitioners to make a showing of need and nonfrivolousness in order to obtain a free transcript. United States v. MacCollom, 426 U.S. 317, 322 (1976); see id. at 330 ("Clearly, there is no constitutional requirement that the United States provide an indigent with a transcript when that transcript is not necessary in order to prove his claim, or when his claim is frivolous on its face.") (Blackmun, J., concurring in the judgment). Moreover, the comment from Britt to which petitioner cites is dicta rather than the Court's holding, and therefore not binding on a court reviewing a state habeas corpus case. See Williams, 529 U.S. at 412-13. Furthermore, the Supreme Court's holding in Bounds v. Smith clearly established the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge. 430 U.S. at 817, 818. This has nothing to do with providing indigent defendants with transcripts. Finally, the Court held in Hardy, that an appellate counsel, who did not represent the defendant at trial, could not discharge his duty "unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." 375 U.S. at 282. Again, this holding does not clearly establish anything with respect to jury voir dire transcripts. Therefore, there is no clearly established Supreme Court precedent for the state court's rule to be in violation of § 2254(d) or Williams. Thus, petitioner's argument, that the trend has been away from requiring an indigent petitioner to show a need, fails.

The California court of appeal in People v. Landry relied in part on Britt's holding that a state could not discriminate against indigent defendants by depriving them of the basic tools of an adequate appeal when such tools were available to defendants who could pay. 49 Cal. App.4th 785, 792 (1996). The court found that "[the petitioner's] request for the entire jury voir dire is related only to a theory for reversal which is simply not cognizable on appeal." Id. As a result, the Landry court determined that the transcript of the complete jury voir dire was "wholly unnecessary" in making a determination on the defendant's Wheeler/Batson claim. Id. at 792-93.

As stated in Section B. 1, supra, the state court does not have to conduct comparative juror analysis. Moreover, the Supreme Court has not clearly established the exact circumstances when states must provide indigent defendants transcripts of prior proceedings. Thus, the state court of appeal in Landry did not apply a rule that was contrary to Supreme Court precedent. Moreover, the state court of appeal reasonably determined that the transcript of the entire jury voir dire was without value in connection with the petitioner's appeal, and therefore unnecessary, because the court could not conduct comparative juror analysis. Id. at 792.

Finally, there is no clearly established Supreme Court precedent that prohibits states from limiting the reasons upon which indigent defendants may obtain transcripts. The Court has been troubled by such requirements. See Britt, 404 U.S. at 228. Nonetheless, the Supreme Courts has upheld a federal statute that requires indigent federal habeas corpus petitioners to make a showing of need and nonfrivolousness in order to obtain a free transcript. See MacCollom, 426 U.S. at 322. Therefore, it would not be contrary to or an unreasonable application of Supreme Court precedent for a state to create and enforce a rule analogous to the one upheld by the Supreme Court in MacCollum. Thus, the state court of appeal could use First District Local Rule 6(d) to require the petitioner to establish with some certainty how the requested materials may be useful on appeal." Moreover, such a rule is not an unreasonable application of Britt because the rule is used to determine the value of the transcript in connection to the petitioner's appeal.

b. The availability of alternative devices that would fulfill the same functions as a transcript

The Court has established that the State need not provide an entire transcript when "part or all of the stenographic transcript in certain cases [are not] germane to the consideration on appeal." Draper v. Washington, 372 U.S. 487, 495 (1963). Moreover, it is the State's burden to show that only a portion of the transcript of an alternative, such as a partial transcript, is needed for an effective appeal. Mayer, 404 U.S. at 195.

The state court of appeal in Landry, also relied on Draper's holding that the state need only provide a record of sufficient completeness to allow proper consideration of the defendant's claims. Id. It concluded that because the appellant had received a complete transcript of the juror in question, he had been furnished a constitutionally complete record, and so the rejection of his request to augment the record with the entire juror voir dire did not violate his right to due process. Id.

In the present case, the state court's reliance on People v. Landry to deny the request to augment the transcript with the entire juror voir dire was not contrary to or an unreasonable application of Supreme Court precedent. The state court does not conduct comparative juror analysis. As a result, the entire juror voir dire transcript was not germane to his appeal. Moreover, the petitioner received the complete voir dire transcript for the juror he contested. Thus, he received a sufficient record to make his appeal. See Draper, 372 U.S. at 495; Coppedge, 369 U.S. at 446.

C. Petitioner's convictions for both possession of a firearm by a ward of the court and unlawful possession of a sawed-off shotgun were not convictions of a greater offense and a lesser-included offense

Petitioner concedes that Cal. Penal Code §12020 (unlawful possession of a saw-off shotgun) is not a necessarily included offense of Cal. Penal Code § 12021 (possession of a firearm by a ward of the court), because its elements are not subsumed within the legal elements of § 12021 as defined by statute. However, petitioner argues that the state court of appeals erred because it relied on California case law that applied the "elements of the statutory offense" test but did not also apply the "accusatory pleading" test. Petitioner further argues that under the "accusatory pleading" test, he was improperly convicted of both a greater and lesser-included offense because both counts of the amended information charge him with possessing a single saw-off shotgun.[13]

The California Supreme Court has stated that "[t]he test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." People v. Pearson, 42 Cal. 3d 351, 355 (1986). In Pearson, the California Supreme Court also acknowledged that it was [sic] be possible for definition of "necessarily included offense" to encompass a comparison of the offenses as defined by statute and as defined in the language of the pleading. 42 Cal.3d at 356 n.2. However, the court did not reach the question of when to include the language of the pleading as part of the comparison. Id.

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[13] Count I of the amended information alleged a violation of Cal. Penal Code § 12021(c) in that "defendant did wilfully and unlawfully own, possess and have custody and control of a firearm, to wit: a sawed-off shotgun." The count also further alleged that the defendant had been adjudged a ward of the juvenile court. Count II alleged a violation of Cal. Penal Code § 12020 in that "defendant did ... possess an instrument and weapon of the kind commonly known as a sawed-off shotgun."

In People v. Scheidt, the defendant was convicted of possession of a sawed-off shotgun and possession of a concealable shotgun by a felon. 231 Cal.App.3d 162, 164 (1991). Count I of the amended information alleged that "said defendant ... did wilfully and unlawfully possess a sawed-off shotgun." Id. at 165 n.6 (internal quotation marks omitted) (ellipses original). Count II of the amended information alleged that "said defendant ... did willfully and unlawfully own or have in his possession or under his custody and control a certain firearm, to wit: a shotgun ... ." Id. (internal quotation marks omitted) (first ellipses original). The court determined that the California Supreme Court had utilized the elements test and the accusatory pleadings test when determining jury instructions as to uncharged lesser offense. Id. (citing People v. Barrick, 33 Cal. 3d 115 (1982), and People v. Marshall, 48 Cal. 2d 394 (1957)). However, the court concluded that the California Supreme Court had not yet resolved "whether offenses categorized as lesser included because of the language of a pleading should result in the same bar against multiple convictions as statutorily lesser included offenses," id. at 166, 167. Consequently, the court in Scheidt held that "only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding," id. at 165-66, and not because of the specific nature of the accusatory pleading. Id. at 166.

In the present case, the state court of appeals relied on People v. Scheidt to reject petitioner's claim. Cal. Ct. App. Op. at 7. The court "agree[d] with the reasoning of Scheidt and reach[ed] a similar conclusion here." Id.

Petitioner's claim fails as a matter of law because the state court of appeals, in relying on Scheidt used the elements test to determine that possession of a sawed-off shotgun was not a lesser included offense of possession of a firearm by a ward of the court. This test is not contrary to or an unreasonable application of Supreme Court precedent. See Brown v. Ohio, 432 U.S. 161, 166 (1977) (stating that the Blockburger test "emphasizes the elements of the two crimes."); Blockburger v. United States, 284 U.S. 299, 304 (1932).

D. Federal Procedural Bar Does Not Apply in This Case

Respondent argued that this court should not review petitioner's claims of prosecutorial misconduct and insufficient evidence to support a conviction because they are procedurally barred. See Coleman v. Thompson, 501 U.S. 722,729 (1991) (stating that federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). There has been question over whether California's "timeliness" procedural bar is an independent and adequate state law ground. The Ninth Circuit has held that California's timeliness bar is an independent ground but that it is not yet an adequate ground. Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003). In Bennett, the Ninth Circuit concluded that the burden of proving the adequacy of the timeliness bar was on the State of California. Id. at 585-86. Because briefing with respect to the instant habeas corpus petition was completed prior to Bennett, this court requested the parties to submit supplemental briefing with respect to the adequacy of California's timeliness bar. Subsequently, respondent withdrew its procedural bar argument.

E. The State Court was Not Unreasonable in Denying Petitioner's Claims of Prosecutorial Misconduct and Insufficient Evidence to Support a Conviction

On April 15, 1999, petitioner's grandmother signed a declaration ("Downs declaration") that recanted her trial testimony. The Downs declaration stated that the sawed-off shotgun, which was recovered from her house and which formed the basis of petitioner's charges, belonged to her late husband. It also stated that the shotgun was located underneath the mattress of the bed in her locked bedroom. Downs further declared that she did not give law enforcement authorities [sic] to search her bedroom pursuant to petitioner's arrest. Moreover, Downs stated that she had not come forward with this information prior to her declaration because the police had threatened to jail her if she had done so. Finally, the Downs declaration alleged that Downs' federal and state constitutional rights had been violated by the police.

On February 22, 2000, the petitioner filed his second habeas corpus petition in the superior court. Petitioner again used the Downs declaration as a basis for the petition,[14] but this time claimed that new evidence would overturn his conviction and show prosecutorial and police misconduct. The superior court denied the petition on April 11, 2000, stating that the petition had not presented a prima facie claim. On April 27, 2000, the court of appeal denied the habeas petition because of California's timeliness procedural bar rule and because petitioner failed to state a prima facie case for relief.

On May 16, 2000, the petitioner filed a habeas petition in the California Supreme Court that claimed the new evidence would overturn his conviction and would show prosecutorial and police misconduct. On July 11, 2000, petitioner filed an amended petition that included claims for prosecutorial and police misconduct, insufficient evidence to uphold a conviction, ineffective assistance of counsel, and unconstitutional use of his prior juvenile adjudication to support a sentence enhancement. The California Supreme Court denied the petition on August 30,2000, but did not give further explanation.

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14. Petitioner used the Downs declaration as a basis for a habeas corpus petition filed in the California court of appeal on September 29, 1999. The petition was summarily denied.

a. California's disposition of recanting testimony is not contrary to or an unreasonable application of Supreme Court precedent

The Supreme Court has stated that a state court "ha[s] every right and the plain duty to scrutinize [the witness'] repudiation with a critical eye, in the light of its familiarity with the facts of [the] crime." Hysler v. Florida, 315 U.S. 411, 417 (1942). In Hysler, the petitioner collaterally attacked his conviction on the basis of the recantation of one of the witnesses against him. Id. at 413. The petitioner claimed that the witness' testimony was perjured and that the witness had testified falsely because of coercion by the police and the prosecutor. Id. The Court acknowledged that the knowing use of perjured testimony and coerced testimony deprived an accused of liberty without due process of law. Id. However, the Court stated that

> [t]he [state court] had to judge the substantiality of this claim on the basis of all that was before it [including the recanting witness' affidavits] .... The [state court] concluded that [the petitioner's] proof did not make out a prima facie case for asking the trial court to reconsider its judgment of conviction. . . . We construe its finding ... to mean that at the petitioner had failed to make the showing of substantiality which, according to the local procedure . . . was necessary in order to obtain the extraordinary relief . . . .

Id. at 421. The Supreme Court's independent examination of the petitioner's claim left "no doubt that the finding of insubstantiality was justified." Id. at 421-22. Moreover, the Supreme Court has stated that "[recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of conviction, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction." Dobbert v. Wainwright, 468 U.S. 1231, 1233-34 (1984) (Brennan, J., dissenting). As a result, recantation testimony will set aside a conviction after the court is satisfied that the recantation is true and that it would have affected the judgment of the jury. Id. at 1334.

In California, "[it has been repeatedly held that where a witness who has testified at a trial makes an affidavit that such testimony is false, little credence ordinarily can be placed in the affidavit, and it is within the judge's discretion whether or not the showing merits the granting of a new trial." People v. McGaughran, 197 Cal. App. 2d 6, 17 (1961); see In re Roberts, 29 Cal. 4th 726, 742 (2003) ("It has long been recognized that the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion.") (citations and internal quotation marks omitted). Thus, the judge's role is to determine whether the recantation is credible. People v. Minnick, 214 Cal. App. 3d 1478, 1482 (1989). "Once the trial court has found the recantation to be believable, it must then decide whether consideration of the recantation would render a different result on retrial reasonably probable." Id.

California's procedure for evaluating recanting testimony parallels what the Supreme Court has outlined in Hysler and Dobbert. Thus, California's standard for evaluating recanting testimony is not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, nor is California's standard an unreasonable application of Supreme Court precedent.

b. California's disposition of the recanting testimony in the instant case was justified

Downs and her husband began to take care of petitioner, their grandson, when he was about two-years-old. (Rep.'s Augmented Tr. at 55.) The prosecutor asked if Downs loved her grandson and she responded "Very much."); (Id.); (see id. at 83)

("Q: Of course you still loved [petitioner], right?; A: Of course I do.; ... ; Q: You still do today.; A: Sure.; Q: It will never change.; A: I hope not.")

During petitioner's trial, both the state prosecutor and petitioner's trial counsel inquired into Downs' relationship to the shotgun and the circumstances of her police interviews. On both direct and cross examination, Downs often testified that she did not know or did not remember the events surrounding petitioner's arrest. (Id. at 61,65, 126, 140, 141 .) But Downs admitted that she had told officers the truth and had no reason to lie to the police officers. (Id. at 73, 82, 140.)

However, at one point in the trial, when the jury was not present, the state prosecutor stated that "I think that the court at this point could make a finding that Ms. Downs is feigning her non-memory, she's faking it." (Id. at 89.) Over defense counsel's objections, the court allowed the prosecutor to read to Downs the police report she signed so that [sic] prosecution could impeach her testimony as to not remembering the events of the day petitioner was arrested. (Id. at 95-96.) Later in the trial, Down's testimony was further impeached via testimony by her son and various law enforcement officers. (See id. at 153-57, 203-04, 251-52, 311.)

Furthermore, at the end of his direct examination, the state prosecutor asked Downs, "When your grandson-when you talked to your grandson on the telephone before testifying here today did he ask you to come in and testify to the jury and tell him you don't remember?" (Id. at 121.) Downs responded, "He might have said that, yes." (Id.).[15]

The California superior court and court of appeals held that petitioner failed to state a prima facie case for the claims that Downs' declaration supported. Thus, the California courts deemed the claims without substantial foundation. See Hysler,

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[15] Both attorneys brought the court's attention to taped conversations between the petitioner and Downs in which the petitioner attempted to influence Downs' testimony. (Id. at 39-40, 90, 97-103.)

315 U.S. at 421 ("The [state court] concluded that [petitioner's] proof did not make out a prima facie case .... [I]ts action leaves no room for doubt that the [state court] deemed the petitioner's claim without substantial foundation."); see Minnick, 214 Cal. App. 3d at 1482 (stating that in considering a witness' recantation, the trial court must "determine whether the new evidence is credible, i.e., worthy of belief by the jury."). The state court was reasonable in holding that petitioner had not stated a prima facie case on the basis of Downs' recantation given the disfavor upon which recanting testimony is looked and the totality of the circumstances surrounding Downs' testimony at trial, i.e., her testimony on direct and cross examination, the impeachment of her testimony, her love for petitioner, and petitioner's attempt to influence Down's testimony. Dobbert, 468 U.S. at 1233-34 (stating that recantation testimony is "often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence") (Brennan, J., dissenting.). Therefore, this court's independent examination of the petitioner's claim leaves "no doubt that the finding of insubstantiality was justified." See Hysler, 315 U.S. at 421-22. Moreover, the state court's ruling that petitioner had not stated a prima facie case did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state court. See § 2254(d)(2).

Since the state court did not find the Downs declaration to be credible, petitioner's claims fail because they are based upon the Downs declaration.

F. Petitioner's Claim of Ineffective Assistance of Counsel Fails

As described in Section E, supra, almost a year after petitioner was convicted, petitioner's grandmother signed a declaration that recanted her trial testimony. Petitioner raised the issue of his counsel's failure to obtain information from

Downs on two habeas petitioners. Both petitions were summarily denied.

Petitioner now utilizes the Downs declaration as evidence that

> [counsel never sent out an investigator to investigate the case; no investigation was conducted into the ownership [sic] of the gun. Counsel never questioned petitioner's grandmother nor obtained any testimony [sic] from her (MS. LILLA DOWNS) if she in fact owned the gun, did she own the house, and was her testimony coerced by the police or if the police threatened her with jail if she claimed ownership of the gun.

(Pet. for a Writ of Habeas Corpus by a Person in State Custody at 7.) Petitioner argues that his trial 11 counsel's failure to investigate the issue was conduct that fell below the standard for effective assistance of trial counsel. (Traverse at 27.)

It is well established that the standard for ineffective assistance of counsel was set forth by Strickland v. Washington, 466 U.S. 668 (1984). Williams v. Taylor, 529 U.S. 362, 391 (2000) ("It is past question that the rule set forth in Strickland qualifies as 'clearly established Federal' law, as determined by the Supreme Court of the United States."'). The Strickland test has two components. "First, the defendants must show that counsel's performance was deficient. This requires showing that a counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious. as to deprive the defendants of a fair trial, a trial whose result is reliable." Strickland; 466 U.S. at 687.

a. The performance of petitioner's trial counsel was not deficient

To establish ineffectiveness, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. The Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

During petitioner's trial, both the state prosecutor and petitioner's trial counsel inquired into Downs' relationship to the shotgun and the circumstances of her police interviews. On direct examination, Downs was asked if she owned the shotgun and if she had the shotgun under her bed in her bedroom. (Rep.'s Augmented Tr. at 62.) Later, Downs answered in the negative as to whether she gave anyone permission to keep the shotgun under her bed and whether she had put it there. (Id. at 116.) The prosecutor also asked Downs whether she had told the parole officers and the police officers the truth and whether she had any reason to lie to them. (Id. at 73, 81.) The prosecutor read from the police report that Downs signed, which described how the petitioner had entered her house and told her that he had a gun. The prosecutor read the last sentence of the statement, "This is a true statement," to which Downs answered "Yes, it is." (Id. at 95-96.)

During cross-examination, petitioner's defense counsel asked Downs several times whether she had been told by petitioner that he had a gun. (Id. at 126, 140.) The defense counsel also asked whether the police regularly contacted Downs the day petitioner was arrested. (Id. 136-38.) Finally, petitioner's defense counsel asked Downs about the state of the house after the police had arrested petitioner and left. (Id. at 139.) Defense counsel's closing argument heavily emphasized Downs' confusion throughout her testimony and the theory that police planted the shotgun. (Id. at 353-61.) He asked the jury to "[c]onsider whether the deployment of police resources and the time they spent that particular day and night and early-morning hours [prior to petitioner's arrest] mandated that they find some evidence of a crime against [petitioner.]" (Id. at 361.)

Both the state prosecutor and petitioner's trial counsel questioned Downs about her relationship and the petitioner's relationship to the sawed-off shotgun. (See id. at 62, 95,96, 116, 126, 140.) Both also questioned her about the interviews conducted by the police. (See id. at 73, 81, 136-38.) Consequently, petitioner's contention-that his counsel did not investigate or question Downs about the ownership of the gun or coercion by the police fails. Moreover, the record shows that petitioner's counsel made a strategic choice to argue that Downs' testimony cast doubt upon whether petitioner had brought the shotgun to her residence, and thus the police planted the shotgun in Downs' residence to justify their invasive raid on her home. (See id. at 139, 353-61.) Counsel's strategy choice was well within the range of "sound trial strategy" and reasonable under the circumstances of the case. See Strickland, 466 U.S. at 689, 690. Thus, the performance of petitioner's trial counsel was not below an objective standard of reasonableness.

b. The performance of petitioner's trial counsel did not prejudice the defense

To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. However, "[i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id.

During Downs' testimony on both direct and cross examination, she often stated that she did not know or did not remember if petitioner had told her that he had a gun. (Rep.'s Augmented Tr. at 61, 65, 126, 140, 141.) She also stated that she did not know or did not remember whether she told others that petitioner made such a statement. (Id. at 61, 67, 69, 74, 127, 140.) But Downs admitted that she had told officers the truth and had no reason to lie to the police officers. (Id. at 73, 82, 140.).

However, at one point in the trial, when the jury was not present, the state prosecutor stated that he believed Downs was feigning her non-memory. (Id. at 89.) Over defense counsel's objections, the court to allowed the prosecutor to read to Downs the police report she signed so that prosecution could impeach her testimony as to not remembering what she had said. (Id. at 95-96.) The police report stated that petitioner came to her house and "told [her] he had a gun and asked me if I wanted to see it." (Id. at 95.) At the end of his direct examination, the state prosecutor asked Downs, "When your grandson-when you talked to your grandson on the telephone before testifying here today did he ask you to come in and testify to the jury and tell him you don't remember?" (Id. at 121 .) Downs responded, "He might have said that, yes." (Id.) At the end of the trial, the court received into evidence the police report that Downs had signed. (Id. at 321-22.) Although defense counsel objected because the statement was hearsay, (id. at 321), the court responded that the "statement made by the witness is inconsistent with her statement here in the courtroom." (Id.)

Downs' testimony as to not remembering any discussion about a gun between petitioner and herself was further impeached via testimony by her son and various law enforcement officers. All of the witnesses testified that Downs told them that petitioner had gone to her residence and told her that he had a gun. (Id. at 153-57) (testimony of Limmie Boyd); (Id. at 203-04) (testimony of Oakland Police Department Sergeant Babka); (id at 251-52) (testimony of Agent Campos, a parole officer); (id. at 311) (testimony of Oakland Police Department Officer Clement). Defense counsel cross-examined each witness about their conversations with Downs regarding her conversation with petitioner when he came to her house, but each testified to the same thing they had on direct examination.

Even if petitioner's trial counsel had performed deficiently, petitioner was not prejudiced. Downs' trial testimony was equivocal-she both confirmed and denied whether petitioner had told her he had a shotgun. However, her testimony was impeached by other witnesses who confirmed that what she said the day petitioner was arrested. Moreover, Downs admitted that petitioner attempted to influence her testimony the week before she was to testify. If Downs had testified that the shotgun belonged to her late husband and that the police had coerced her into perjuring herself, the jury would have also weighed such a statement against her credibility in light of the impeaching evidence. In looking at the totality of the evidence before the jury such as the evidence of impeachment, it cannot be said that there is a reasonable probability the jury would have had a reasonable doubt respecting guilt. See Strickland, 466 U.S. at 695. Thus, petitioner was not prejudiced.

The performance of petitioner's trial counsel was neither deficient nor prejudicial to petitioner's defense. Accordingly, petitioner's claim of ineffective assistance of counsel fails.

G. The State Court's Use of Petitioner's Prior Juvenile Conviction to Support a Sentence Enhancement was Not Contrary to or an Unreasonable Application of Supreme Court Precedent

On June 18, 1991, petitioner, who was represented by a public defender, pled guilty to his juvenile charges. Petitioner was adjudged a ward of the Juvenile Court of Alameda County for committing an attempted murder with a firearm and inflicting great bodily injury on the victim. The maximum term for his confinement was fourteen years. Petitioner was committed to the California Youth Authority, where he was on parole when he was convicted for the two charges underlying this habeas petition.

During the proceedings for petitioner's current convictions, the amended information charged that petitioner had been found to be a fit and proper subject to be dealt with under the juvenile court law and that petitioner had been adjudged a ward of the juvenile court. Petitioner's trial was bifurcated with regard to the possession charges and the prior conviction charge. Petitioner waived trial by jury as to the prior juvenile adjudication, which the court found to be true after trial of the prior adjudication.

Petitioner was sentenced on June 30, 1998. The court used petitioner's prior juvenile offense to double his sentence from three years to six years under Cal. Penal Code § 12021(e), which is a part of California's three strikes law. During petitioner's sentencing, petitioner made a motion to strike his prior juvenile conviction on the basis that use of a prior juvenile conviction to enhance a sentence may be illegal. The court denied the motion but allowed petitioner to reserve the right to appeal the issue. The petitioner included this claim in his first amended habeas petitioner to the California Supreme Court, which summarily denied the petition on August 30, 2000.

Petitioner now argues that his juvenile guilty plea is unconstitutional because the plea was not knowing and voluntary, and consequently, the use of the juvenile conviction to enhance his sentence was improper. Petitioner also argues that use of the non-jury juvenile adjudication to enhance his current sentence under the three strikes law was unconstitutional.

1. Petitioner cannot challenge the constitutionality of his prior juvenile conviction in this petition

a. One-year statute of limitation under the Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires a state prisoner seeking federal habeas relief to file his petition within one year, unless otherwise tolled, after his state conviction becomes final. 28 U.S.C. § 2244(d)(l)(A). The limitations period on application for writ of habeas corpus by a petitioner whose conviction became final before the effective date of AEDPA is one year from AEDPA's effective date, which was April 24, 1996. Green v. White, 223 F.3d 1001, 1002-03 (9th Cir. 2000); Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999); see Carey v. Saffold, 536 U.S. 214, 217 (2002).

Petitioner pled guilty to his juvenile charge and was convicted on June 18, 1991. Petitioner's ability to directly appeal his juvenile conviction has long since passed. Cal.R. of Ct. 39(b) ("In the cases provided by law, an appeal from the juvenile court is taken by filing with the clerk of that court a written notice of appeal *within 60 days* after the rendition of the judgment ....") (emphasis added); Cal R. of Ct. 31(d) ("If a judgment of conviction is entered upon a plea of guilty . . . the defendant shall, *within 60 days* after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the [California] Penal Code ....") (emphasis added). Since petitioner's juvenile conviction became final before the AEDPA went into effect, petitioner had one year from April 24, 1996 to file a federal habeas petition for that conviction. Petitioner did not file a federal habeas petition. Petitioner has also not presented any reason why that one year period should be equitably tolled. Thus, under AEDPA, petitioner can no longer collaterally challenge the constitutionality of his prior conviction.

b. Because petitioner's prior conviction is no longer open to attack, petitioner cannot challenge his sentence enhancement by arguing that his prior juvenile conviction was unconstitutional

The Supreme Court in Lackawanna County District Attorney v. Coss made clear that once a defendant can no longer directly or collaterally attack a state conviction, he may not challenge his enhanced sentence by arguing that the prior conviction was unconstitutionally obtained. 532 U.S. 394, 403-04 (2001).[16] An exception the rule enunciated in Lackawanna is if the petitioner can demonstrate that the prior conviction was obtained because there was a failure to appoint counsel in violation of the Sixth Amendment. Id. at 404.[17]

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16. The Supreme Court specifically held that

> once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. [Citation] If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001).

17. The court notes that petitioner argues that the Lackawanna holding also so enunciated other exceptions. In Lackawanna, Justice O'Connor delivered the Court's opinion with respect to Parts I, II, III-A, and IV. However, petitioner cites to Part III-B, a part of the opinion with which only two other justices joined, to support his argument. (See Traverse at 31.) Thus, petitioner once again erroneously attributes the authority of precedent to a part of a Supreme Court opinion which is not the majority's holding.

Petitioner argues that in Allen v. Oregon, 153 F.3d 1046 (9th Cir. 1998), and Brock v. Weston, 31 F.3d 887 (9th Cir. 1994), the Ninth Circuit held that collateral attacks on prior sentences used to enhance other sentences may be challenged in habeas proceedings. Indeed, the Ninth Circuit did make such a holding *"in the absence of a Supreme Court holding to the contrary."* Brock, 31 F.3d at 891 (emphasis added); see Allen, 153 F.3d at 1049 n.3 ("We express no opinion as to whether [United States v. Custis, 511 U.S. 485 (1994)] limits [petitioner's] ability to challenge his prior state convictions in an attack on his current federal sentence as 'enhanced.'").[18] The Supreme Court has now made a holding to the contrary. See Lackawanna, 532 U.S. at 403-04.

As stated in Section G1.a, supra, petitioner's juvenile conviction became final before AEDPA went into effect. Thus, petitioner had until April 24, 1997, to file a federal habeas petition for that conviction. Petitioner did not file a federal habeas petition and has not presented any reason why that one year period should be equitably tolled. Therefore, petitioner's juvenile conviction is now conclusively valid. See id. Petitioner also cannot argue that he falls within the exception-that he was not appointed counsel in violation of the Sixth Amendment-because a public defender represented petitioner during his juvenile proceedings. See id. Consequently, petitioner can no longer challenge his enhanced sentence on the ground that his prior juvenile conviction was unconstitutionally obtained. See id.

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[18] Thus, in the absence of clearly established federal law as set forth by the Supreme Court, it cannot be said that the state court applied a rule that was contrary to or an unreasonable application of Supreme Court precedent when the state court did not examine the validity of petitioner's prior conviction in order to review petitioner's claim that his current sentence could not be enhanced by his prior conviction because his prior conviction was unconstitutional.

2. The Use of a Prior Juvenile Conviction to Support a Sentence Enhancement is Not Contrary to or an Unreasonable Application of Supreme Court Precedent

Petitioner argues that the use of his nonjury juvenile conviction to enhance his current sentence is unconstitutional because federal case law prohibits the use of prior juvenile adjudications as sentence enhancements. Petitioner's claim fails for two reasons. First, the federal case law petitioner cites does not stand for the proposition that a prior juvenile adjudication may never be used to enhance a sentence. Instead, the case law sets out the procedural steps a court must take in order to use the prior juvenile conviction to enhance a sentence. Second, the state court did not apply a rule that was contrary to or an unreasonable application of Supreme Court precedent.

The Supreme Court has clearly established that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)); id. at 490. "Thus, the Supreme Court has held that prior convictions are exempt from Apprendi's general rule and, as sentencing factors, need not be afforded the same procedural protections that attach to facts that are construed as elements of the charged crime." United States v. Tighe 266 F.3d 1187, 1192 (9th Cir. 2001). However, the Supreme Court has not clearly established whether juvenile convictions fall within the "prior conviction" exception to Apprendi's general rule. Tighe, 266 F.3d at 1193.

As a result, in a split decision, the Ninth Circuit declined to extend Apprendi's "prior conviction" exception to include prior nonjury juvenile adjudications. In Tighe, the defendant challenged the use of his prior juvenile conviction to enhance his sentence under a federal criminal sentencing statute. 266 F.3d at 1190. The court observed that in creating the exception, the Supreme Court did not "specifically address[] the unique issues that distinguish juvenile adjudications from adult convictions." Id. at 1193. Based on its reading of Supreme Court precedent, the Ninth Circuit concluded that "the 'prior conviction' exception to Apprendi's general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." Id. at 1194. Since most juvenile adjudications do not afford such protection, the Ninth Circuit held that nonjury juvenile convictions do not fall within Apprendi's "prior conviction" exception. Id. at 1194-95. If juvenile convictions do not fall within Apprendi's "prior conviction" exception, then they must fall within Apprendi's general rule. See id. Accordingly, the fact of a juvenile conviction must to be submitted to a jury and proved beyond a reasonable doubt. See Apprendi, 530 U.S. at 476. Although the Ninth Circuit did not explicitly state that the fact of a juvenile conviction must to be submitted to a jury and proved beyond a reasonable doubt, this is the logical conclusion of the court's reasoning.[19]

The California court of appeal, however, has reached a conclusion opposite of the Ninth Circuit. See People v. Bowden, 102 Cal.App.4th 387, 394; People v. Fowler, 72 Cal. App. 4th 581, 583 (1999). California's three strikes law defines "prior felony conviction" to include certain juvenile convictions. Cal. Penal Code § 1170.12(b)(3). In Fowler, a pre-Apprendi case, the California court of appeal held that "[t]he fact defendant was neither afforded or waived a jury trial at the prior juvenile adjudication does not prevent the use of that adjudication as a strike for purposes of sentencing in his current adult proceeding." Id. at 587. In Bowden, a post-Apprendi case, the California court of appeal affirmed its holding in Fowler and rejected the Ninth Circuit's holding in Tighe. 102 Cal.App.4th at 394. The court of appeal first determined that Apprendi and Tighe did not apply because in those cases the sentencing judge made a factual determination that resulted in a sentence enhancement. Id. at 392-93. In contrast, California's three strikes law requires a qualifying prior conviction to be pleaded and proved beyond a reasonable doubt before a jury, if the defendant chooses to have a jury. Id. Moreover, the court of appeals stated that "even in its own context (prior convictions determined solely by a judge as a sentencing consideration), the Tighe majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context of the Three Strikes law." Id. at 393. The court "agree[d] with the Tighe dissent that the Tighe majority made a 'quantum leap' from certain language in a Supreme Court opinion and erroneously concluded prior juvenile adjudications are not prior convictions." Id. at 393 (quoting Tighe, 266 F.3d at 1200 (Brunetti, J. dissenting)). Consequently, the California court of appeal has upheld the'use of juvenile convictions as prior convictions for the purpose of enhance [sic] a subsequent criminal sentence.

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[19] Thus, as stated before, petitioner's argument, that the Ninth Circuit "concluded that [Apprendi and Jones] prohibited the use of prior juvenile adjudications as sentence enhancements," misstates the Ninth Circuit's holding in Tighe. (Traverse at 30); see Tighe, 266 F.3d at 1194-95 (holding essentially that prior juvenile adjudications fall within Apprendi's general rule, and must be submitted before a jury and proved beyond a reasonable doubt before used to enhance a sentence).

a. The trial court's determination that petitioner had a juvenile conviction was not an unreasonable application of Supreme Court precedent

The Supreme Court has not clearly established whether the "prior conviction" exception to Apprendi's general rule includes juvenile convictions. See Tighe, 266 F.3d at 1193 (stating that the Supreme Court has not "specifically addressed the unique issue[]."). This has lead to different interpretations by the Ninth Circuit and the California state courts. Compare id. at 1194 (holding that prior juvenile convictions do not fall within Apprendi's exemption) with People v. Bowden, 102 Cal. App. 4th 387, 394 (rejecting Tighe's holding). Moreover, it has also led to different interpretations in other Circuit Court of Appeals and state courts. See United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002) (rejecting the Tighe majority opinion); State v. Hitt, 273 Kan. 224 (2002) (stating that its survey of the available case law showed that both the Tighe majority and the Tighe dissent were followed and holding that Apprendi's exception for prior convictions encompasses juvenile adjudications). Because there is no clearly established Supreme Court precedent as to whether juvenile adjudications fall under Apprendi's "prior conviction" exemption, it cannot be said that California's interpretation, that prior juvenile convictions can be used to support a sentence enhancement, is contrary to or an unreasonable application of Supreme Court precedent. Consequently, petitioner's claim fails.

b. The trial court's procedure to determine that petitioner had a juvenile conviction was analogous to the Supreme Court's rule in Apprendi

The state alleged in its amended information that petitioner had suffered a prior juvenile conviction. Petitioner's trial was then bifurcated. In the first trial, petitioner stipulated that he had suffered a prior conviction. As a result, the jury did not have to deliberate on that element when it determined whether petitioner was in unlawful possession of a firearm after having suffered a juvenile adjudication for a felony. *Petitioner waived July trial* with respect to the state's allegation that he had suffered a prior juvenile conviction. Consequently, the court held a bench trial on that allegation directly after the jury convicted petitioner of the two possession counts. After the evidence was presented, the court determined that petitioner had suffered a prior juvenile conviction. The court used petitioner's prior juvenile conviction to double the sentence of his current convictions.

The state alleged that petitioner had suffered a prior juvenile conviction, proved that charge beyond a reasonable doubt, and submitted the fact to the court rather than a jury because petitioner waived a jury trial on the state's allegation. The judge, sitting as the fact finder because petitioner waived a jury, subsequently found that petitioner had suffered a prior juvenile conviction. Petitioner cannot now turn around and claim that the state violated Apprendi and Tighe because it did not prove his prior juvenile conviction beyond a reasonable doubt before a *jury*. Petitioner was the one who waived a jury trial on the allegation. It would be illogical to allow a petitioner who waives his right to a jury trial on the fact of his prior juvenile conviction to then fault the state for not presenting that fact before a jury. The state did submit the allegation to the fact finder of petitioner's choice, the trial judge.

Thus, the state submitted a fact that would be used to enhance a sentence to the fact finder of petitioner's choice and proved that fact beyond a reasonable doubt. See Apprendi, 530 U.S. at 490; Tighe, 266 F.3d at 1194-95. This was done regardless of whether the fact of petitioner's prior juvenile conviction fell within Apprendi's "prior conviction" exemption. As a result, petitioner's claim fails.

III. ORDER

For the foregoing reasons, the petitioner for writ of habeas corpus is DENIED.

DATED: 8/16/03 s/

RONALD M. WHYTE
United States District Judge

THIS SHALL CERTIFY THAT A COPY OF THIS ORDER WAS PROVIDED TO:

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Date: AUG 08 2003

Chambers of Judge Whyte

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOBASSA BOYD, *Petitioner-Appellant,*	No. 03-17098
v.	D.C. No.
ANTHONY C. NEWLAND, Warden, *Respondent-Appellee.*	CV-00-21287-RMW OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
October 4, 2004-San Francisco, California

Opinion Filed December 29,2004

Before: Richard D. Cudahy,* Susan P. Graber, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Graber

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals affirmed a judgment of the district court. The court held that Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal.

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*The Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit. sitting by designation.

After exhausting California state-court post-conviction procedures without success, appellant Mobassa Boyd, an African-American, petitioned for a writ of habeas corpus in federal district court, challenging the state appellate court's rulings that he failed to show that the prosecutor's use of peremptory strikes against African-American jurors was race based; that he was not entitled to a transcript of the entire voir dire, free of charge, for a comparative analysis of all jurors; that as a indigent defendant, he was not entitled to an entire trial transcript as a matter of right; and that the state court properly used a nonjury juvenile adjudication to increase his sentence from three to six years. The state appellate court wrote that Boyd had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations and that Boyd clearly did not establish a prima facie case of group discrimination, even under federal precedent. The state appellate court listed several race-neutral grounds that appeared in the juror's responses on voir dire. The district court denied Boyd's Petition.

Boyd appealed.

[1] To succeed on his charge of racial bias, Boyd first had to establish a prima facie case of purposeful discrimination. He had to who that (1) he and the prospective juror were members of a cognizable racial group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raised an inference that the strike was motivated by race. [2] Only the third element of the prima facie case was at issue. [3] The state appellate court ruled that Boyd had failed to establish a prima facie case under either state or federal law. Because the state appellate court recognized the difference between the two standards, and affirmed the trial court under both, its determination deserved deference.

[4] Although the Constitution forbids striking even a single

prospective juror for a discriminatory purpose, the fact that an African-American potential juror was stricken does not, by itself, suggest racial bias. Even the use of two peremptory strikes against members of a cognizable minority group does not necessarily suffice to constitute a prima facie showing of bias. **[5]** Evidence in the record of objective reasons to strike a juror implied that racial bias did not motivate the prosecutor. In the circumstances, the state court did not apply federal law unreasonably when it ruled that Boyd had failed to make a prima facie showing.

[6] California court do not entertain comparative juror analysis for the first time on appeal. Instead, a defendant must present a comparative juror analysis to the trial court to preserve the issue for review. **[7]** Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal. Therefore, no error could be found.

[8] An applicable California rule requires an indigent defendant to establish with some certainty how the requested materials may be useful on appeal before it will provide transcript free of charge. **[9]** A court need only provide an indigent defendant with a record of sufficient completeness to prepare an appeal; irrelevant or extraneous portions of the transcript may be omitted. The Supreme Court has never compelled a state court to provide an entire voir dire transcript. **[10]** More importantly, the Supreme Court has upheld a federal statute that is similar to California's rule. **[11]** The California rule did not run counter to clearly established federal law. Boyd was not entitled, as a matter right, to an entire trial transcript, and the state court's finding was entitled to deference.

[12] Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **[13]** The Ninth Circuit has held that the prior conviction exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. Consequently, the Ninth Circuit does not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily the Ninth Circuit does not allow sentencing enhancements based on such adjudications. **[14]** California courts disagree with the Ninth Circuit, concluding that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. Likewise, the Third and Eighth Circuits have held that the *Apprendi* prior conviction exception includes nonjury juvenile adjudications, which can be used to enhance a defendant's sentence. To date, the Supreme Court has not resolved the conflict. **[15]** In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But, in the face of authority that was directly contrary to the Ninth Circuit's, and in the absence of explicit direction from the Supreme Court, the Ninth Circuit could not hold that the California courts' use of Boyd's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent. The judgment of the district court had to be affirmed.

COUNSEL

Mark E. Eibert, Half Moon Bay, California, for the petitioner-appellant.

Glenn R. Pruden, Deputy Attorney General, State of California, San Francisco, California, for the respondent-appellee.

OPINION

GRABER, Circuit Judge:

In this case, the California courts denied Petitioner's Batson[20] motion; denied his request for a free transcript of the entire voir dire for use on appeal; and enhanced his sentence because of a nonjury juvenile adjudication. We must ask whether any of those rulings was contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court. Because we answer "no," we affirm the district court's denial of habeas corpus relief.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, Mobassa Boyd, is African-American. He was charged in California with unlawfully possessing a firearm after having previously suffered a juvenile adjudication for a felony, Cal. Penal Code § 12021(e), and with unlawfully possessing a sawed-off shotgun, *id.* § 12020(a)(1).

During voir dire, the prosecutor used a peremptory strike to excuse an African-American prospective juror. Petitioner's counsel made a *Batson* motion, asserting that the strike was race-based.[21] Counsel said only this: "There was nothing that I could glean in the responses [of the potential juror to voir dire questions] which would lead me to believe that there was sort have [sic] any tangible reasons whereby someone might excuse her as being a potentially partial juror." At the time of the disputed peremptory challenge, another African-American potential juror had been stricken for cause; two other African-Americans remained as potential jurors; and the prosecutor had used two other peremptory challenges on non-African-American jurors. The trial court denied the motion, finding that Petitioner's "showing falls short of showing a prima facie case" of racial bias in the prosecutor's use of the peremptory challenge.

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[20] *Batson* v. *Kentucky*, 476 U.S. 79 (1986)

[21] Petitioner's counsel challenged the peremptory strike under *People* v. *Wheeler*, 583 P.2d 748 (Cal. 1978). *Wheeler* prohibits, under the California Constitution, the use of racially motivated peremptory challenges. *Id.* at 761-62. A *Wheeler* motion serves as an implicit objection under *Batson*, *People* v. *Yeoman*, 72 P.3d 1166, 1188 (Cal. 2003), *cert. denied*, 124 S. Ct. 2018 (2004), so Petitioner preserved his federal constitutional claim. Accordingly, we refer to counsel's objection as a *Batson* motion.

The jury that eventually was empaneled convicted Petitioner. Petitioner waived his right to have a jury determine the truth of his prior juvenile adjudication. The trial court found the juvenile adjudication to be true and, accordingly, increased Petitioner's sentence from three to six years. Cal. Penal Code § 667(d)(3), 1170.12(b)(3).

Petitioner filed three requests to supplement the record to include the entire voir dire transcript. The California Court of Appeal granted Petitioner's requests in part and required that he be provided the voir dire of the excused African-American juror plus his counsel's argument under *Batson*. But the Court of Appeal denied Petitioner's requests for the entire voir dire transcript because he did not comply with a California local rule that requires a defendant to "establish with some certainty how the requested materials may be useful on appeal." Cal.Ct.App., First App. Dist. Local Rule 6(d) (2003). The court also relied on controlling California precedent, which does not require a court to provide a defendant with an entire voir dire transcript free of charge. *See People v. Landry*, 56 Cal.Rptr.2d 824, 828 (Ct. App. 1996) (holding that when the purpose of the request is to compare the testimony of jurors, but no such comparison was made at the trial level, a court need not provide a free voir dire transcript).

On direct appeal to the California Court of Appeal, Petitioner challenged the denial of his *Batson* motion. The Court of Appeal affirmed Petitioner's conviction, and the California Supreme Court denied his petition for review without comment.[22] After exhausting state-court-post-conviction procedures without success, Petitioner petitioned for a writ of habeas corpus in federal district court. The district court denied his petition. Petitioner now appeals to us.

STANDARD OF REVIEW

We review de novo a denial of a petition for habeas corpus. *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

We may not disturb a state court's determination unless it "was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir.), *cert. denied*, 124 S. Ct. 446 (2003). AEDPA imposes a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997).

DISCUSSION

A. *Batson Claim*

[1] To succeed on his charge of racial bias, Petitioner first must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 93-94; *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999) (en banc). He must show that (1) he and the prospective juror are members of a "cognizable racial group," (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motived by race. *Batson*, 476 U.S. at 96; *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001). If he failed to establish a prima facie case, then the motion properly was denied; the prosecutor need not have provided a race-neutral explanation for the strike. *Batson*, 476 U.S. at 96-97; *Cooperwood*, 245 F.3d at 1046.

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[22] Under AEDPA, we review the last reasoned state-court decision. *Brodit v. Cambra*, 350 F.3d 985, 987 (9th Cir. 2003). Accordingly, we examine the California Court of Appeal's decision here.

[2] The first and second elements of the test are met, because Petitioner and the prospective juror are African-American, and the prosecutor used a peremptory strike to remove the juror. Only the third element of the prima facie case is at issue, that is, whether the state court erred in failing to recognize an inference of racial motivation.

Petitioner first argues that the California Court of Appeal's decision was "contrary to" federal law, 28 U.S .C. § 2254(d)(l), because the court used an incorrect legal standard in determining whether he had made out a prima facie case. If he were correct, we would not defer to the state court. *See Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000) (holding that when the state court uses the wrong legal standard, the rule of deference does not apply). But we read the state court's decision differently.

In affirming the trial court's ruling on the peremptory strike, the California Court of Appeal wrote that Petitioner had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations. The "strong likelihood" wording originates from *Wheeler*, the California equivalent of *Batson*, and the *Wheeler* standard places on the defendant a more onerous burden of proof than that required by the "raise an inference" standard of *Batson*. *See Wade*, 202 F.3d at 1192 ("We hold that the *Wheeler* standard, as currently interpreted by the California courts, does not satisfy the constitutional requirement laid down in *Batson*.").

[3] But the California court did not stop there. It also held that Petitioner "clearly did not establish a prima facie case of group discrimination, even under federal precedent." In other words, the Court of Appeal did not rely only on the *Wheeler* standard, instead holding that Petitioner had failed to establish a prima facie case under *either* state *or* federal law. Because the Court of Appeal recognized the difference between the two standards, and affirmed the trial court under both, its determination deserves deference. *See Tolbert*, 182 F.3d at 682-83 (describing deference owed to state court's prima facie determination under *Batson*).

Petitioner also argues that the California courts were wrong to conclude that he had failed to establish a prima facie case under *Batson*. We are not persuaded that the Court of Appeal applied *Batson* unreasonably.

[4] The disputed peremptory strike was the prosecutor's third, but the first used to dismiss an African-American prospective juror. Additionally, two African-Americans remained in the pool after the use of this strike. Although "the Constitution forbids striking even a single prospective juror for a discriminatory purpose," the fact that an African-American potential juror was stricken does not, by itself, suggest racial bias. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *Wade*, 202 F.3d at 1198. Even the use of two peremptory strikes against members of a cognizable minority group does not necessarily suffice to constitute a prima facie showing of bias. *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989).

[5] On appeal, Petitioner repeats the claim he made at trial–that no nonracial reason existed for the peremptory challenge. To the contrary, the Court of Appeal listed several race-neutral grounds that appeared in the juror's responses on voir dire. For example, the juror expressed ambivalence about

the justice system, saying "it's fair in some cases; depends on the case." As another example, the juror "sound[ed] a little hesitant" when asked whether missing work would distract her. Evidence in the record of objective reasons to strike a juror implies that racial bias did not motivate the prosecutor. *See Paulino v. Castro*, 371 F.3d 1083, 1091-92 (9th Cir. 2004) ("While we may consider whether the record contains entirely plausible reasons, independent of race, why a prosecutor may have exercised peremptories, such reasons have usually helped persuade us that defendant made no prima facie showing where defendant challenged the excusal of *just one juror*." (emphasis added) (citation and internal quotation marks omitted)); *Wade*, 202 F.3d at 1198 (noting that "entirely plausible reasons, independent of race," for striking a juror support a finding that the prosecutor did not act based on racial bias). In the circumstances, the state court did not apply federal law unreasonably when it held that Petitioner had failed to make a prima facie showing under *Batson*.

B. *Voir Dire Transcript*

Petitioner next argues that the California Court of Appeal unreasonably applied federal law, and violated his rights to due process and equal protection, when the court denied his requests for a transcript of the entire voir dire, free of charge, so that he could prepare his *Batson* claim. Petitioner contends that *Batson* requires a comparative analysis of all jurors in every case and that, as an indigent defendant, he has an absolute right to the entire trial transcript. We will consider each claim in turn.

1. *Comparative Juror Analysis*

[6] "Comparative juror analysis" refers, in this context, to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 331-33 (2003) (engaging in comparative juror analysis); *Mitleider v. Hall*, No. 03-56097, 2004 WL 2827660, at *8 n.9 (9th Cir. Dec. 10, 2004) (conducting a comparative juror analysis to discern whether differing life experiences justified the use of a peremptory strike against an African-American juror in a case in which a prima facie showing had been made). California courts do not entertain comparative juror analysis for the first time on appeal. *See People v. Johnson*, 71 P.3d 270, 284 (Cal. 2003) ("[W]e do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled."), *cert. dismissed*, 124 S. Ct. 1833 (2004). Instead, a defendant must present a comparative juror analysis to the trial court to preserve the issue for review:

> When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case.

Id. at 285; *see also Batson*, 476 U.S. at 98 n.21 (explaining that "a reviewing court ordinarily should give [the trial court's] findings" great deference in the context of deciding, at the final step of the analysis, whether the defendant has established purposeful discrimination); *Kesser v. Cambra*, No. 02-15475, 2004 WL 2903976 (9th Cir. Dec. 16, 2004) (declining to undertake, or direct the district court to undertake, a comparative juror analysis at the third *Batson* step, when a record supporting a comparative juror analysis had not been developed in the state court proceeding).

Petitioner challenges the preservation requirement, and its application to him, on both practical and theoretical grounds. As a practical matter, Petitioner argues, California's preservation requirement places him in an untenable position: he cannot show that a comparative juror analysis took place at the trial court without a full transcript of the voir dire, but he cannot obtain a complete transcript unless he shows that the trial court engaged in comparative juror analysis.

The dilemma is not as stark as Petitioner suggests. Both Petitioner and his trial counsel attended the whole voir dire. They know whether counsel did anything other than argue the absence of objective reasons to strike the one juror in question and whether a comparative juror analysis would have helped or hindered Petitioner's bare *Batson* claim. Yet neither presented an affidavit with Petitioner's requests to augment the record, suggesting that Petitioner had sought, or that the trial court had engaged in, a comparative juror analysis. California precedent requires nothing more difficult than that.

On a more theoretical level, Petitioner asserts that an appellate court must engage in comparative juror analysis to decide every *Batson* motion. To support his assertion, Petitioner points to *Batson* itself. There, the Supreme Court enumerated several ways for a defendant to establish a prima facie case of racial discrimination:

> For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

476 U.S. at 97 (emphasis added). The *Batson* opinion

contemplates that numerous avenues exist for establishing a prima facie case in the trial court, only one of which involves comparative juror analysis. And, the opinion makes no mention of comparative juror analysis at the appellate level. So *Batson* does not clearly establish a requirement of comparative juror analysis on appeal.

More recently, the Supreme Court assessed whether the Fifth Circuit properly denied a certificate of appealability in a case involving a *Batson* claim, and the Court held that a certificate should have been granted. *Miller-El,* 537 U.S. at 322.[23/] Miller-El had presented to the state trial court comparative evidence, which the Court then analyzed.[24/] *Id.* at 331-35. But the Court did not, and did not require an appellate court to, conduct a comparative juror analysis in the first instance. Also, the Court was analyzing the race-neutral reasons that the prosecutor proffered after conceding the defendant's prima facie case, rather than analyzing a prima facie case. *Id.* at 343. Because *Miller-El* did not decide anything about how to establish a prima facie case, or about how to examine a prima facie case on appeal, it cannot stand for the proposition that comparative juror analysis is required to be done for the first time on appeal.

[7] In summary, Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time

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23. On remand, the Fifth Circuit rejected Miller-El's *Batson* claim on the merits. *Miller-El* v. *Dretke,* 361 F.3d 849 (5th Cir. 2004). The case has returned to the Supreme Court. *See Miller-El* v. *Dretke,* 124 S. Ct. 2908 (2004) (granting .petition for certiorari).

24. Miller-El's trial occurred before *Batson,* which was decided during the pendency of his appeal. *Miller-El,* 537 U.S. at 328. Consequently, Miller-El's case was remanded to the trial court to determine whether he had shown purposeful discrimination under *Batson.* He presented a much more extensive comparative juror analysis in the post-trial hearing. Here, Petitioner's trial occurred after *Batson,* yet he does not claim that he presented any comparative juror analysis at trial.

on appeal. We, therefore, find no error.

2. *Transcript as a Matter of Right*

[8] In the alternative, Petitioner argues that, as an indigent defendant, he was entitled to an entire trial transcript as a matter of right. *See Britt v. North Carolina*, 404 U.S. 226, 227 (1971) ("[T]he state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal."); *cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1057 (9th Cir. 2004) (holding that clearly established Supreme Court precedent requires the state to provide an indigent defendant with a full transcript of the entire trial court proceeding for use in a second trial), *petition for cert. filed*, 73 U.S.L.W. 3324 (U.S. Nov. 15, 2004) (No. 04-679). An applicable California rule requires an indigent defendant to "establish with some certainty how the requested materials may be useful on appeal" before it will provide a transcript free of charge.[25] The Court of Appeal relied on that rule when it denied in part Petitioner's requests to augment the record. Neither that rule nor its application here violates clearly established Supreme Court law.

[9] A court need only provide an indigent defendant with "a record of sufficient completeness" to prepare an appeal; irrelevant or extraneous portions of the transcript may be omitted. *Mayer v. City of Chicago*, 404 U.S. 189, 194-95 (1971). Petitioner had the transcript of the challenged juror's voir dire, his counsel's argument, and the court's ruling; he provided the state court with no specific rationale for needing more. Although the Court has found constitutional error where a court has failed to provide an indigent defendant with certain parts of trial transcripts on appeal, it has never compelled a state court to provide an entire voir dire transcript. *See, e.g., Britt*, 404 U.S. at 228 (stating that the transcript of a prior mistrial ordinarily can be assumed to be valuable to a defendant, although ultimately finding no error because an alternative to the transcript existed); *Williams v. Oklahoma City*, 395 U.S. 458, 458-59 (1969) (per curiam) (finding constitutional error where the state provided no trial transcript to an indigent defendant on appeal); *Gardner v. California*, 393 U.S. 367, 371 (1969) (holding that the indigent defendant had to be provided with a transcript of an evidentiary hearing from his original trial, so that he could file a new habeas petition); *Long v. Dist. Court of Iowa*, 385 U.S. 192, 192-94 (1966) (per curiam) (holding that a court's failure to provide a defendant with *any* portion of a habeas transcript was error). A fortiori, the Supreme Court has never compelled a state court to provide an entire voir dire transcript in the absence of a good reason for requiring it.

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[25] In pertinent part, the rule provides:

> A motion to augment the reporter's transcript shall identify the portion of the record with specificity, including the reporter and date of hearing. It shall establish with some certainty how the requested materials may be useful on appeal. Requests for jury voir dire should specify the exact questioning by which counsel of which juror together with the reason justifying the request.

Cal. Ct. App., First App. Dist. Local Rule 6(d) (2003).

[10] More importantly, the Supreme Court has upheld a federal statute that is similar to California's local rule 6(d). In *United States v. MacCollom*, 426 U.S. 317, 322-23 (1976), the Court held that a statute requiring a judge to make a finding that a habeas petition is not frivolous and that a transcript is needed, before providing an indigent defendant with a trial transcript, does not violate the United States Constitution.

[11] In short, the California rule requiring an indigent defendant to show a specific need to obtain a complete voir dire transcript does not run counter to clearly established federal law. Petitioner is not entitled, as a matter of right, to an entire trial transcript, and we must defer to the state court's finding that he did not make the showing contemplated by the local rule.

C. *Nonjury Juvenile Adjudication*

[12] Finally, Petitioner contends that the state court violated clearly established federal law by using a nonjury juvenile adjudication to increase his sentence from three to six years. In *Apprendi v. New Jersey, 530* U.S. 466, 490 (2000), the Supreme Court held that, "[other than the fact of *prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) Petitioner argues that a juvenile adjudication does not qualify as a "conviction" under the *Apprendi* exception.

[13] We have held that the *Apprendi* "prior conviction" exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001). Consequently, we do not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications. *Id.* at 1194-95.

[14] California courts disagree with *Tighe*. They conclude that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. *See, e.g., People v. Bowden*, 125 Cal. Rptr. 2d 513, 517 (Ct.App. 2002) ("[T]he *Tighe* majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context of the Three Strikes law."). *But see People v. Smith*, 1 Cal.Rptr. 3d 901,907-29 (Ct. App. 2003) (Johnson, J., concurring in part and dissenting in part) (relying on *Tighe* to argue against the use of a prior nonjury juvenile conviction to enhance a defendant's sentence). Likewise, the Third and Eighth Circuits have held that the *Apprendi* "prior conviction" exception includes nonjury juvenile adjudications, which can be used to enhance a defendant's sentence. *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (stating that "we find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court . . . , that requires us to hold that prior nonjury juvenile adjudications that afforded *all* required due process safeguards cannot be used to enhance a sentence"), *cert. denied*, 124 S. Ct. 1145 (2004); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) ("We therefore conclude that juvenile adjudications can rightly be characterized as 'prior convictions' for *Apprendi* purposes, and that the district court did not err in increasing [the defendant's] sentence based on his prior juvenile adjudications."), *cert. denied*, 537 U.S. 1114 (2003); *cf*: Note, *Constitutional Law-Right to Jury Trial-Eighth Circuit Holds an Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purposes of Sentence Enhancement at a Subsequent Criminal Proceeding*, 116 Harv. L. Rev. 705, 708 (2002) (comparing various circuits' approaches and suggesting that "*Tighe's* understanding of the jury trial right is more consistent with the implications of the Supreme Court's recent jury trial jurisprudence"). To date, the Supreme Court has not resolved the conflict.

[15] Although we are not suggesting that *Tighe* was incorrectly decided, as these varying interpretations of *Apprendi* suggest, the opinion does not represent clearly established federal law "as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. *See Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999) (stating that Ninth Circuit case law may be used to help determine clearly established federal law). But, in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable applications of, Supreme Court precedent.

AFFIRMED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOBASSA BOYD,
Petitioner-Appellant,
v.
ANTHONY C. NEWLAND, Warden,
Respondent-Appellee,

No. 03-17098
DC No.
CV-00-21287-RMW
ORDER AND
AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
October 4, 2004-San Francisco, California

Opinion Filed December 29, 2004
Amended June 26, 2006

Before: Richard D. Cudahy,* Susan P. Graber, and
Raymond C. Fisher, Circuit Judges

Opinion by Judge Graber

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held

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*The Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

that a state court's refusal to provide a defendant with the whole voir dire transcript, in the face of a plausible *Batson* claim, involved an unreasonable application of clearly established federal law.

After exhausting California state-court post-conviction procedures without success, appellant Mobassa Boyd, an African-American, petitioned for a writ of habeas corpus in federal district court, challenging the state appellate court's ruling that he failed to show that the prosecutor's use of a peremptory strike against an African-American juror, leaving only two other African-American prospective jurors in the pool, was race based; that he was not entitled to a transcript of the entire voir dire, free of charge, for a comparative analysis of all jurors; that as an indigent defendant, he was not entitled to an entire trial transcript as a matter of right; and that the state court properly used a nonjury juvenile adjudication to increase his sentence from three to six years. The state appellate court wrote that Boyd had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations and that Boyd clearly did not establish a prima facie case of group discrimination, even under federal precedent. The state appellate court listed several race-neutral grounds that appeared in the juror's responses on voir dire. The district court denied Boyd's petition.

Boyd appealed. The court of appeals previously held that Boyd did not make a prima facie case of purposeful discrimination. The Supreme Court later issued two opinions dealing with the application of *Batson* to peremptory challenges: *Johnson v. California*, 125 S.Ct. 2410 (2005), and *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005) (*Miller-El II*). The court of appeals asked the parties for additional briefing to discuss the implications of those decisions for Boyd's case.

[1] To succeed on his charge of racial bias, Bo yd first had to establish a prima facie case of purposeful discrimination. He had to show that (1) the prospective juror was a member of a cognizable racial group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raised an inference that the strike was motivated by race. [2] Only the third element of the prima facie case was at issue. [3] The state appellate court ruled that Boyd had failed to establish a prima facie case under either state or federal law. Because the state appellate court recognized the difference between the two standards, and affirmed the trial court under both, its determination deserved deference.

[4] In *Johnson,* the Supreme Court emphasized that the threshold for making a prima facie *Batson* claim is quite low. [5] In *Miller-El II,* the Court made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims. [6] Federal habeas corpus petitioners cannot rely on new constitutional rules of criminal procedure that took effect after their convictions became final. The court of appeals was convinced that *Johnson* and *Miller-El II* merely clarified *Batson* and did not establish new rules of criminal procedure. [7] *Johnson* discussed the standard that *Batson* first established. [8] *Miller-El II* only clarified the extant *Batson* three-step framework.

[9] At the first *Batson* step, when a defendant raises a plausible *Batson* claim, a court must analyze the context in which the contested peremptory strike arose. [10] The facts suggested that Boyd's *Batson* claim was at least plausible, and the court should consider context in order to determine whether Boyd raised an inference of discrimination.

[11] The court of appeals was stymied in considering Boyd's *Batson* claim in light of the "totality of the relevant facts" by the California courts' refusal to provide an entire voir dire transcript to Boyd. [12] The court of appeals recognized that its previous

reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis on appeal. **[13]** The court of appeals did not hold that comparative juror analysis always is compelled at the appellate level. But, comparative juror analysis is an important tool that courts should use on appeal. **[14]** This analysis is called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the *Batson* analysis. **[I5]** It had to be concluded that all defendants, including those who are indigent, have a right to have access to the tools that would enable them to develop their plausible *Batson* claims through comparative juror analysis. **[16]** It had to be held that, in light of Boyd's plausible *Batson* claim, the California appellate courts' denial of his request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law.

[17] Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **[18]** The Ninth Circuit has held that the prior conviction exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. Consequently, the Ninth Circuit does not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily the Ninth Circuit does not allow sentencing enhancements based on such adjudications. **[19]** California courts disagree with the Ninth Circuit, concluding that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. Likewise, the Third and Eighth Circuits have held that the *Apprendi* prior conviction exception includes nonjury juvenile adjudications, which can be used to enhance a defendant's sentence. To date, the Supreme Court has not resolved the conflict. **[20]** In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But, in the face of authority that was directly contrary to the Ninth Circuit's, and in the absence of explicit direction from the Supreme Court, the Ninth Circuit could not hold that the California courts' use of Boyd's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent. **[21]** The judgment of the district court had to be affirmed in part, reversed in part, and remanded in part, with instructions to grant the petition for habeas corpus with respect to the *Batson* claim.

COUNSEL

Mark E. Eibert, Half Moon Bay, California, for the petitioner appellant.

Glenn R. Pruden, Deputy Attorney General, State of California, San Francisco, California, for the respondent-appellee.

ORDER

The Opinion filed on December 29, 2004, slip op. at 17513, and appearing at 393 F.3d 1008 (9th Cir. 2004), is amended. The Amended Opinion will be filed contemporaneously with this Order.

With this amendment, the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judges Graber and Fisher have voted to deny the petition for rehearing en banc and Judge Cudahy has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED. Further petitions for rehearing or petitions for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

The California courts denied a Batson[26] motion made by Petitioner Mobassa Boyd and denied his request for a free transcript of the entire voir dire for use on appeal. We must ask whether those rulings were contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court. In an earlier decision in this case, we answered "no." *Boyd v. Newland*, 393 F.3d 1008 (9th Cir. 2004). In response to a petition for rehearing and in light of recent Supreme Court cases clarifying *Batson v. Kentucky*, 476 U.S. 79 (1986), we conclude that our earlier analysis was flawed. We now hold that the California appellate courts violated clearly established federal law by denying Petitioner's habeas petition because, without an entire voir dire transcript, those courts could not evaluate the relevant circumstances surrounding the contested strike, as *Batson* requires. In that respect we reverse and remand with instructions to grant the petition for a writ of habeas corpus.

Petitioner also argues that the California courts erred by enhancing his sentence because of a nonjury juvenile adjudication. As in our earlier decision, we disagree and, in this respect, affirm.

FACTUAL AND PROCEDURAL HISTORY

Petitioner Mobassa Boyd is African-American. He was charged in California with unlawfully possessing a firearm after having previously suffered a juvenile adjudication for a felony, Cal. Penal Code § 12021(e), and with unlawfully possessing a sawed-off shotgun, *id.* § 12020(a)(l).

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[26] *Batson v. Kentucky*, 476 U.S. 79 (1986).

During voir dire, the prosecutor used a peremptory strike to excuse an African-American prospective juror. Petitioner's counsel made a *Batson* motion, asserting that the strike was race-based.[27] At the time of the disputed peremptory challenge, another African-American potential juror had been stricken for cause; two other African-Americans remained as potential jurors; and the prosecutor had used two other peremptory challenges on non-African-American jurors. The trial court denied the motion, finding that Petitioner's "showing falls short of showing a prima facie case" of racial bias in the prosecutor's use of the peremptory challenge.

The jury that eventually was empaneled convicted Petitioner. Petitioner waived his right to have a jury determine the truth of his prior juvenile adjudication. The trial court found the juvenile adjudication to be true and, accordingly, increased Petitioner's sentence from three to six years. Cal. Penal Code § 667(d)(3) 1170.12(b)(3).

Petitioner filed three requests to supplement the record to include the entire voir dire transcript. The California Court of Appeal granted Petitioner's requests in part and required that he be provided the voir dire of the excused African-American juror plus his counsel's argument under *Batson*. But the court of appeal denied Petitioner's requests for the entire voir dire transcript because it concluded that he did not comply with a California local rule that requires a defendant to "establish with some certainty how the requested materials may be useful on appeal." Cal. Ct. App., First App. Dist. Local Rule 6(d) (2003). The court also relied on controlling California precedent, which does not require a court to provide a defendant with an entire voir dire transcript free of charge. *See People v. Landry*, 56 Cal. Rptr. 2d 824, 828 (Ct. App. 1996) (holding that when the purpose of the request is to compare the testimony of jurors, but no such comparison was made at the trial level, a court need not provide a free voir dire transcript).

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[27] Petitioner's counsel challenged the peremptory strike under *People* v. *Wheeler*, 583 P.2d 748 (Cal. 1978). *Wheeler* prohibits under the California Constitution, the use of racially motivated peremptory challenges. *Id.* at 761-62. A *Wheeler* motion serves as an implicit objection under *Batson*, *People* v. *Yeoman*, 72 P.3d 1166, 1187-88 (Cal. 2003), so Petitioner preserved his federal constitutional claim. Accordingly. we refer to counsel's objection as a *Batson* motion.

On direct appeal to the California Court of Appeal, Petitioner challenged the denial of his *Batson* motion. The court of appeal affirmed Petitioner's conviction, and the California Supreme Court denied his petition for review without comment.[28] After exhausting state-court post-conviction procedures without success, Petitioner petitioned for a writ of habeas corpus in federal district court. The district court denied his petition. Petitioner now appeals to us.

STANDARD OF REVIEW

We review de novo a denial of a petition for habeas corpus. *Dubria v. Smith*, 224 F.3d 995, 1000 (9th. Cir. 2000) (en banc).

We may not disturb a state court's determination unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Clark v.*

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[28] Under AEDPA, we review the last reasoned state-court decision. *Brodit* v. *Cambra,* 350 F.3d 985, 987 (9th Cir. 2003). Accordingly, we examine the California Court of Appeal's decision here.

Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003).

DISCUSSION

A.Batson *Claim*

[1] To succeed on his charge of racial bias, Petitioner first must establish a prima facie case of purposeful discrimination. *Batson*, 476-U.S. at 93-94; *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999) (en banc). He must show that (1) the prospective juror is a member of a "cognizable racial group," (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motived by race. *Batson*, 476 U.S. at 96; *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001). If he failed to establish a prima facie case, then the motion properly was denied; the prosecutor need not have provided a race-neutral explanation for the strike. *Batson*, 476 U.S. at 96-97; *Cooperwood*, 245 F.3d at 1046.

[2] The first and second elements of the test are met, because the prospective juror is African-American, and the prosecutor used a peremptory strike to remove the juror. Only the third element of the prima facie case is at issue, that is, whether the state court erred in failing to recognize an inference of racial motivation.

Petitioner first argues that the California Court of Appeal's decision was "contrary to" federal law, 28 U.S.C. § 2254(d)(1), because the court used an incorrect legal standard in determining whether he had made out a prima facie case. If he were correct, we would not defer to the state court. *See Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000) (holding that when the state court uses the wrong legal standard, the rule of deference does not apply). But we read the state court's decision differently.

In affirming the trial court's ruling on the peremptory strike, the California Court of Appeal wrote that Petitioner had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations. The "strong likelihood" wording originates from *Wheeler*, the California equivalent of *Batson*, and the *Wheeler* standard impermissibly places on the defendant a more onerous burden of proof than that required by the "raise an inference" standard of *Batson*. *See Johnson v. California*, 125 S. Ct. 2410, 2413-14 (2005) (agreeing with the Ninth Circuit that the *Wheeler* standard, which requires a petitioner to show that a peremptory challenge more likely than not was based on impermissible group bias, is more demanding than the standard enunciated in *Batson*, and therefore violates the Constitution); *Wade*, 202 F.3d at -1192 ("We hold that the *Wheeler* standard, as currently interpreted by the California courts, does not satisfy the constitutional requirement laid down in *Batson*.").

[3] But the California court did not stop there. It also held that Petitioner "clearly did not establish a prima facie case of group discrimination, even under federal precedent." In other words, the court of appeal did not rely only on the *Wheeler* standard, instead holding that Petitioner had failed to establish a prima facie case under either state or federal law. Because the court of appeal recognized the difference between the two standards, and affirmed the trial court under both, its determination deserves deference. *See Tolbert*, 182 F.3d at 682-83 (describing deference owed to state court's prima facie determination under *Batson*).

Petitioner also argues that the California courts were wrong to conclude that he failed to establish a prima facie case under *Batson*. We previously held that Petitioner did not make a prima facie case of purposeful discrimination. *Boyd*, 393 F.3d at 1013. Shortly after we published our decision, however, the Supreme Court issued two opinions dealing with the application of

Batson to peremptory challenges: *Johnson v. California*, 125 S. Ct. 2410 (2005), and *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) (*Miller-El II*).[29] We asked the parties for additional briefing to discuss the implications of those decisions for this case. After further consideration, we now conclude that our previous opinion misunderstood *Batson* and that, without an entire voir dire transcript, the California appellate courts could not have considered the circumstances surrounding the contested strike, could not have evaluated the potential inference of racial bias, and therefore could not properly have found that Petitioner failed to establish a prima facie case.

[4] In *Johnson*, the Supreme Court reviewed the level of proof necessary to establish a prima facie case of discrimination under the first step of *Batson*, 125 S.Ct. at 2416. in *Johnson*, the prosecution used three of its 12 peremptory challenges to strike the only African-American prospective jurors from the pool. *Id*. at 2414. Defense counsel made *Batson* motions after the second and third strikes against African-American prospective jurors. After the latter *Batson* motion, the trial court concluded that, although the situation was "very close," the

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[29] This is not the first time that the Supreme Court granted certiorari in that case. In *Miller-El v. Cockrell,* 537 U.S. 322, 326-27 (2003) *(Miller-El I):* the Supreme Court reviewed the petitioner's challenge to the denial of his request for a certificate of appealability ("COA") so that he could pursue habeas corpus relief based on a claim of group bias in jury selection. At Miller-El's trial, the prosecution used peremptory strikes against 10 of 11 African-American prospective jurors. *Id.* at 326. Miller-El's trial predated *Batson,* but by the time he filed his federal habeas motion, *Batson* was well entrenched. *Id.* at 327. The Fifth Circuit refused to grant a COA, concluding that the petitioner had failed to establish a viable claim of constitutional error. *Id.* at 326-27. The Supreme Court reversed, finding that it was at least debatable whether a violation of Miller-El's constitutional rights had occurred. *Id.* at 348. After a remand, the Fifth Circuit denied Miller-El's habeas petition on the merits. The Supreme Court again granted certiorari in *Miller-El II,* to consider whether the circuit court's decision was correct.

defense had not established a prima facie case of racial bias. *Id.* The Supreme Court reversed, emphasizing that the threshold for making a prima facie *Batson* claim is quite low:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge–on the basis of all the facts, some of which are impossible for the defendant to know with certainty–that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Id. at 2417.

[5] On the same day, the Supreme Court also decided *Miller-El II. In Miller-El II*, the Court used comparative juror analysis at the appellate level to determine whether the prosecution had been motivated by racial bias in exercising its peremptory strikes. 125 S. Ct. at 2325-38. "Comparative juror analysis" refers, in this context, to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group. *See, e.g., id.* (engaging in comparative juror analysis); *Mitleider v. Hall*, 391 F.3d 1039, 1049 n.9 (9th Cir. 2004) (conducting a comparative juror analysis to discern whether differing life experiences justified the use of a peremptory strike against an African-American juror in a case in which a prima facie showing had been made), *cert. denied*, 125 S. Ct. 2968 (2005). *Miller-El II* made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black venire panelists

who were struck and white panelists allowed to serve." 125 S. Ct. at 2325.

[6] Both *Johnson* and *Miller-El II* were decided after petitioner's conviction became final. The government has argued that even if *Miller-El II* requires or encourages comparative juror analysis on appeal, its rule cannot apply to the case at hand under *Teague v. Lane*, 4890 U.S. 288 (1989). *Teague* held that federal habeas corpus petitioners cannot rely on new constitutional rules of criminal procedure that took effect *after* their convictions became final. *Id.* at 310.[30] Because the government argues that Petitioner is requesting the benefit of a rule decided after his original appeal was decided, and thus after his conviction became final, we must address *Teague* before turning to the merits of his claim. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). We are convinced that *Johnson* and *Miller-El II* merely clarify *Batson* and do not establish new rules of criminal procedure.

[7] *Johnson* discusses the standard that *Batson* first established. The *Johnson* opinion relies almost exclusively on the wording used in the *Batson* opinion; we have concluded that *Johnson* explains. *Batson, see Yee v. Duncan*, 441 F.3d 851, 857 n.9 (9th Cir. 2006) (noting that *Johnson* is "an example of the Supreme Court's consistent interpretation of *Batson* to date" but not deciding the *Teague* issue); and the state does not contend that *Johnson* established a new rule, *see Caspari*, 510 U.S. at 389 (noting that if the state does not argue that *Teague* applies, a court need not consider it).

[8] Neither does *Miller-El II* create a new rule of criminal procedure. Instead, it simply illustrates the means by which a

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[30] There was no majority opinion in *Teague*. However, the Court has treated Justice O'Connor's pluarlity opinion as embodying its holding *See, e.g., Tyler v. Cain*, 533 U.S. 656, 665 (2001).

petitioner can establish and should be allowed to establish, a *Batson* error. *See Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005) (stating that in *Miller-El II*, the Court did not announce "any new elements or criteria for determining a *Batson* claim" but merely applied *Batson* in the circumstances of that particular case), *cert. denied*, 126 S.Ct. 1028, (2006). *Miller-El II* fits within the *Batson* framework, which provides that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. *Batson* its elf required courts to consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Id.* at 94, 96. Moreover, we are persuaded that the opinion's support of comparative juror analysis on appeal did not create a new rule because the Supreme Court applied the rule to Miller-El himself. The *Teague* rule applies to the Supreme Court as well as to lower courts. *See Sawyer v. Smith,* 497 U.S. 227, 239 (1990) (affirming the lower court's refusal to apply the holding of one of the Court's previous opinions to a defendant because the rule established in that case was new). Therefore, if the Supreme Court's endorsement of comparative juror analysis on appeal constituted a new procedural rule, the Court would not have applied that rule to Miller-El, whose case came before the Court on an appeal from a denial of habeas corpus. *Miller-El v. Dretke,* 361 F.3d 849 (5th Cir. 2004). Because the Court did engage in extensive comparative juror analysis, we can infer that *Miller-El II* must only have clarified the extant *Batson* three-step framework. *See Frazer v. South Carolina,* 430 F.3d 696, 704-06 (4th Cir. 2005) (concluding that an earlier Supreme Court case did not establish a new rule because, procedurally, the case reached the Court on a challenge to a denial of habeas corpus but the Court addressed the merits of the petitioner's claim and remanded for further proceedings, which it could not have done under *Teague* if it were creating a new rule).

[9] Accordingly, we now turn to the merits of Petitioner's *Batson* claim. In order to determine, at the first *Batson* step, whether racial bias motivated a prosecutor's decision to remove a potential juror, a court must consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Batson,* 476 U.S. at 94, 96. Thus, when a defendant raises a plausible *Batson* claim, a court must analyze the context in which the contested peremptory strike arose. *See Johnson,* 125 S. Ct. at 2419 (reversing the state court's denial of habeas corpus because all three of the African-American prospective jurors were stricken and the state court judges found the circumstances suspicious). In our earlier *Boyd* opinion, we misread *Batson* to require more certainty of discriminatory motive.

[10] In this case, it is clear the Petitioner raised at least a plausible *Batson* claim and that contextual analysis is therefore appropriate. After the prosecutor used a peremptory challenge to strike an African-American juror (Petitioner is of the same race), Petitioner's counsel objected, arguing that this was the second African-American juror removed from the jury pool (the first having been removed for cause), there remained only two potential African-American jurors in the pool, and nothing in the struck juror's voir dire responses intimated a legitimate basis for removal. These facts. though not alone sufficient to establish a prima facie case, suggest that Petitioner's *Batson* claim was at least plausible, and the court should consider context in order to determine whether Petitioner has raised an inference of discrimination. *See Johnson*, 125 S.Ct. at 2417.

[11] There are two main ways that we could consider Petitioner's *Batson* Claim in light of the "totality of the relevant facts." *Batson*, 476 U.S. at 94. But for both of them we are stymied by the California courts' refusal to provide an entire voir dire transcript to Petitioner.

First, we could look at percentages. Here, the prosecution used its third peremptory strike to dismiss an African-American prospective juror. The first two peremptory strikes were used against prospective jurors who were not African-American. We have held that, "[t]o establish a prima facie case, [a petitioner does] not need to show that the prosecution ha[s] engaged in a pattern of discriminatory strikes against more than one prospective juror" because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Nonetheless, in some cases, courts have found it helpful to compare the number of minority prospective jurors stricken to non-minority prospective jurors stricken. *See Miller-El II*, 125 S. Ct. at 2325 (noting that "[t]he numbers describing the prosecution's use of peremptories are remarkable."); *Wade*, 202 F.3d at 1198 (reviewing the statistical evidence of the number of African-American potential jurors stricken compared to the racial makeup of the other potential jurors who were struck and of the pool at large, although noting that statistical disparities can be misleading).

We know only that the prosecutor used a peremptory strike to remove one African-American juror and that two other African-American prospective jurors remained in the pool at that time. Because the state courts did not furnish a complete voir dire transcript to Petitioner, who is indigent, we lack the additional data that would allow the kind of statistical analysis that both the Supreme Court and this court have performed in the past.

Second, we could assess "all relevant circumstances," *Batson*, 476 U.S. at 96, surrounding the challenged peremptory strike by engaging in comparative juror analysis. To support his claim, Petitioner contends here, as did his trial counsel in the first instance, that no nonracial reason existed for the peremptory challenge. In order to assess Petitioner's claim, we must compare the prospective juror who was stricken with the other prospective jurors who were not.

[12] In our first Boyd opinion, we held that *Batson* does not compel a court to conduct comparative juror analysis for the first time on appeal. *Boyd*, 393 F.3d at 1015. We looked to California cases that require a petitioner to preserve the issue at trial, in order for a court to consider comparative juror analysis on appeal. *See, e.g., People v. Johnson*, 71 P.3d 270, 285 (Cal. 2003) (noting that the court maintains its "longstanding practice" of refusing to engage in comparative juror analysis for the first time on appeal), *rev 'd on other grounds*, *Johnson*, 125 S. Ct. 2410. But after *Miller-El II*, we recognize that our previous reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis on appeal. In *Miller-El II* the prosecution used 10 of its peremptory challenges to strike African-American jurors, leaving only one African-American juror in the pool. 125 S. Ct. at 2325. After Miller-El was convicted, but while his appeal was pending, the Supreme Court decided *Batson*. *Id.* at 2346 (Thomas, J., dissenting). The state court of appeals remanded the case for a *Batson* hearing, where defense counsel presented some evidence about the jurors who were struck and the government was forced to explain its strikes. *Id.*

[13] The Supreme Court, though, looked beyond the evidence that Miller-El had presented to the trial court and conducted a comprehensive comparative juror analysis on appeal. *Id.* at 2325-38 & 2326 n.2. Accordingly, the California courts' view that comparative juror analysis can take place on appeal only when the trial court engaged in such analysis in the first instance has been called into question:

> Defendant asks us to examine the responses of jurors other than Juror T. [,the African-American juror struck,] in determining whether the trial court erred in finding that

> defendant failed to establish a prima facie case of group bias. In earlier cases we explained that, although such an examination is appropriate at the trial court level when the issue is properly brought to that court's attention, such an examination for the first time on appeal is unreliable. Defendant urges reconsideration of these cases in light of the high court's decision in *Johnson*, in which the court did not comment upon whether comparative analysis should be undertaken for the first time on appeal, and another decision issued the same day, *Miller-El* [II], in which the court employed comparative juror analysis in circumstances in which it was undisputed that a prima facie case had been made. Assuming without deciding that a comparative juror analysis should be undertaken under the circumstances presented [in which the trial court found that the defendant failed to make a prima facie case], we conclude [that] defendant's proffered analysis fails to establish a prima facie case of group bias.

People v. Cornwwell, 117 P.3d 622, 635 (Cal. 2005) (citations omitted), *cert. denied,* 126 S. Ct. 1432 (2006). Like the various California courts to address the issue, we do not hold that comparative juror analysis *always* is compelled at the appellate level. *See, e.g., People v. Ward,* 114 P.3d 717, 728 (Cal. 2005) (declining to decide whether *Miller-El II* requires comparative juror analysis on appeal, but concluding that even if it did, such an analysis did not support the defendant's claim that the prosecution's peremptory strikes were motivated by racial bias), *cert. denied*, 126 S. Ct. 1625 (2006). But, comparative juror analysis is an important tool that courts *should* use on appeal.

[14] Moreover, because comparative juror analysis assists a court in determining whether the totality of the circumstances gives rise to an inference of discrimination, we believe that this analysis is called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the *Batson* analysis. Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either step one or step three of *Batson* was unreasonable in light of Supreme Court precedent. In *Miller-El II,* the trial court concluded that the defendant had made a prima facie case and had asked the prosecution to provide race-neutral reasons for the strikes. 125 S. Ct. at 2323. The Court, on review, at the third *Batson* step considered the written and oral statements made by all the prospective jurors and the prosecution's stated reasons for dismissing the African-American jurors to determine whether race played a role in the prosecution's use of its peremptory strikes. *Id.* at 2325-38.

Some California courts have questioned whether comparative juror analysis is similarly appropriate at the first *Batson* step, where the prosecution has not voiced its rationales for the strikes, instead of at the third *Batson* step. *See, e.g.*, *People v. Gray*, 118 P.3d 496, 511 (Cal. 2005) ("*Miller-El [II]* thus did not consider whether an appellate court must conduct a comparative juror analysis in the first instance, when the objector has failed to make a prima facie showing of discrimination, or whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial."), petition for cert. filed, ___ , U.S.L.W. ___ (U.S. Feb. 23, 2006) (No. 05-9564); *People v. Guerra*, 129 P.3d 321, 351 (Cal. 2006) ("Performing a comparative analysis is problematic when, as here, the prosecutor did not provide reasons for the challenge because the trial court found no prima facie case had been established."). We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.

In *Miller-El II*, the Supreme Court did not merely review the reasons that the prosecutor gave for peremptorily striking the African-American jurors; instead it also considered the voir dire questions that the prosecutor had posed to the various jurors. 125 S. Ct. at 2333-38. The Court concluded that the prosecutor asked different questions of minority prospective jurors from those it asked of nonminority prospective jurors in order to elicit different responses, which could then justify a peremptory strike on purportedly nonracial grounds. *Id.* at 2337. In some circumstances, a court may have to review the questions that the prosecution asked of jurors at step one of the *Batson* analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination. There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*. *Cf. United States v. Esparza-Gonzalez*, 422 F.3d 897, 904-05 (9th Cir. 2005) (engaging, on direct review, in comparative juror analysis to hold that the defendant established a prima facie case of intentional unlawful discrimination).

Further, both *Johnson* and *Miller-El II* suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes. If a trial court's conclusion that a defendant failed to make a prima facie case could insulate from review a prosecution's use of peremptory strikes, the holdings of those Supreme Court opinions would be undermined.

[15] But we can engage in no comparative juror analysis here, because we do not know what happened during the entirety of the voir dire. Because we hold that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim, we also must conclude that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis.

"[Tlhe State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The Supreme Court has held that indigent defendants must be provided with various portions of the trial transcript. *See, e.g.*, *id.* at 228 (stating that the transcript of a prior mistrial ordinarily can be assumed to be valuable to a defendant, although ultimately finding no error because an alternative to the transcript existed); *Williams v. Oklahoma City*, 395 U.S. 458, 458-59 (1969) (per curiam) (finding constitutional error where the state provided no trial transcript to an indigent defendant on appeal); *Gardner v. California*, 393 U.S. 367, 370-71 (1969) (holding that the indigent defendant had to be provided with a transcript of an evidentiary hearing from his original trial, so that he could file a new habeas petition); *Long v. Dist. Court of Iowa*, 385 U.S. 192, 192-94 (1966) (per curiam) (holding that a court's failure to provide a defendant with any portion of a habeas transcript was error). We recognize that the Court has never explicitly held that an indigent defendant is entitled to an entire voir dire transcript as of right, but *Miller-El II* makes comparative juror analysis a centerpiece of the *Batson* analysis, and that analysis cannot be done in the absence of a voir dire transcript. Accordingly, the state court's refusal to provide Petitioner with the whole voir dire transcript, in the face of a plausible *Batson* claim, involved an unreasonable application of clearly established Supreme Court precedent.

In denying, in part, Petitioner's request for an entire voir dire transcript, the state courts relied on a California rule that requires an indigent defendant to "establish with some certainty how the requested materials may be useful on appeal" before it will provide a transcript free of charge.[31] Petitioner argues that the rule is unconstitutional because it places him in the untenable position of having to establish how the entire transcript would be helpful to him, without having access to the transcript to make such a showing.

We do not agree that local rule 6(d) violates the Constitution. The Supreme Court has upheld a federal statute that is similar to California's local rule 6(d). In *United States v. MacCollom*, 426 U.S. 317, 322-23 (1976) (plurality opinion), the Court concluded that a statute requiring a judge to make a finding that a habeas petition is not frivolous and that a transcript is needed, before providing an indigent defendant with a trial transcript, does not violate the United States Constitution. In short, the California rule requiring an indigent defendant to show a specific need to obtain a complete voir dire transcript does not run counter to clearly established federal law.

The state court's error was simply in holding that an indigent defendant who raised a plausible *Batson* claim had failed to "establish with some certainty how the requested" voir dire transcript could help him on appeal, pursuant to local rule 6(d). *Batson* and its progeny explain why, as a matter of Supreme Court law, such a transcript may be useful on appeal.

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[31] In pertinent part, the rule provides:

> A motion to augment the reporter's transcript shall identify the portion of the record with specificity, including the reporter and date of hearing. It shall establish with some certainty how the requested materials may be useful on appeal. Requests for jury voir dire should specify the exact questioning by which counsel of which juror together with the reason justifying the request.

Cal. Ct. App., First App. Dist. Local Rule 6(d).

[16] In summary, under Supreme Court precedent the burden for making a prima facie case is not an onerous one. *Johnson*, 125 S. Ct. at 2417. When an appellate court must decide whether the trial court that denied a *Batson* motion should instead have drawn "an inference that discrimination . . . occurred," *id.* at 2419, *Batson* supports the use of comparative juror analysis, *Miller-El II*, 125 S. Ct. at 2325-38. A reviewing court cannot examine the "totality of the relevant facts" and "all relevant circumstances," *Batson*, 476 U.S. at 94, 96, surrounding a prosecutor's peremptory strike of a minority potential juror without an entire voir dire transcript. We do not hold that Petitioner has satisfied his burden of establishing a prima facie showing of unlawful discrimination under *Batson*'s first step. Rather, we hold that, in light of Petitioner's plausible *Batson* claim, the California appellate courts' denial of Petitioner's request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law.

B. *Nonjury Juvenile Adjudication*

[17] Finally, Petitioner contends that the state court violated clearly established federal law by using a nonjury juvenile adjudication to increase his sentence from three to six years. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "[o]ther than the fact of *a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) Petitioner argues that a juvenile adjudication does not qualify as "conviction" under the *Apprendi* exception.

[18] We have held that the *Apprendi* "prior conviction" exception encompasses only those proceedings that provide a defendant with the procedural safeguard of a jury trial and of proof beyond a reasonable doubt. *United States v. Tighe*, 266

F.3d 1187, 1194 (9th Cir. 2001). Consequently, we do not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications. *Id.* at 1194-95.

[19] California courts disagree with *Tighe*. They conclude that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. *See, e.g., People v. Bowden*, 125 Cal.Rptr.2d 513, 517 (Ct.App. 2002) ("[T]he *Tighe* majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context and the Three Strikes law."). *But see People v. Smith*, 1 Cal.Rptr. 3d 901, 907-29 (Ct.App.2003) (Johnson, J., concurring in part and dissenting in part) (relying on *Tighe* to argue against the use of a prior nonjury juvenile conviction to enhance a defendant's sentence). Likewise, the Third, Eighth, and Eleventh Circuits have held that the *Apprendi* "prior conviction" exception includes nonjury juvenile adjudications, which can be used to enhance a defendant's sentence. *United States v. Burge*, 407 F.3d 1183, 1190-01 (11th Cir.) (holding that a juvenile adjudication may be used as a "prior conviction" for *Apprendi* purposes), *cert. denied*, 126 S.Ct. 551 (2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (stating that "we find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court . . . , that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence"); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) ("We therefore conclude that juvenile adjudications can rightly be characterized as 'prior convictions' for *Apprendi* purposes, and that the district court did not err in increasing [the defendant's] sentence based on his prior juvenile adjudications."); *cf.* Note, *Constitutional Law–Right to Jury Trial–Eighth Circuit Holds an Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purposes of Sentence Enhancement at a*

Subsequent Criminal Proceeding, 116 Harv. L. Rev. 705, 708 (2002) (comparing various circuits' approaches and suggesting that "*Tighe*'s understanding of the jury trial right is more consistent with the implications of the Supreme Court's recent jury trial jurisprudence"). To date, the Supreme Court has not resolved the conflict.

[20] Although we are not suggesting that *Tighe* was incorrectly decided, as some of these varying interpretations of *Apprendi* suggest, the opinion does not represent clearly established federal law "as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(l). In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. *See Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999) (stating that Ninth Circuit case law may be used to help determine clearly established federal law). But, in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.

[21] AFFIRMED in part; REVERSED AND REMANDED in part, with instructions to grant the petition for habeas corpus with respect to the *Batson* claim.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOBASSA BOYD, *Petitioner-Appellant,* v. ANTHONY C. NEWLAND, Warden, *Respondent-Appellee.*	No. 03-17098 D.C. No. CV-00-21287-RMW ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
October 4, 2004-San Francisco, California

Opinion Filed December 29, 2004
Amended June 26, 2006
Second Amendment October 26, 2006

Before: Richard D. Cudahy,* Susan P. Graber, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Graber

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*The Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that a state court's refusal to provide a defendant with the whole voir dire transcript, in the face of a plausible *Batson* claim, involved an unreasonable application of clearly established federal law.

After exhausting California state-court post-conviction procedures without success, appellant Mobassa Boyd, an African-American, petitioned for a writ of habeas corpus in federal district court, challenging the state appellate court's rulings that he failed to show that the prosecutor's use of a peremptory strike against an African-American juror, leaving only two other African-American prospective jurors in the pool, was race based; that he was not entitled to a transcript of the entire voir dire, free of charge, for a comparative analysis of all jurors; that as an indigent defendant, he was not entitled to an entire trial transcript as a matter of right; and that the state court properly used a nonjury juvenile adjudication to increase his sentence from three to six years. The state appellate court wrote that Boyd had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations and that Boyd clearly did not establish a prima facie case of group discrimination, even under federal precedent. The state appellate court listed several race-neutral grounds that appeared in the juror's responses on voir dire. The district court denied Boyd's petition.

Boyd appealed. The court of appeals previously held that Boyd did not make a prima facie case of purposeful discrimination. The Supreme Court later issued two opinions dealing with the application of *Batson* to peremptory challenges:

Johnson v. California, 125 S. Ct. 2410 (2005), and *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) (*Miller-El II*). The court of appeals asked the parties for additional briefing to discuss the implications of those decisions for Boyd's case.

[1] To succeed on his charge of racial bias, Boyd first had to establish a prima facie case of purposeful discrimination. He had to show that (1) the prospective juror was a member of a cognizable racial group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raised an inference that the strike was motivated by race. **[2]** Only the third element of the prima facie case was at issue. **[3]** The state appellate court ruled that Boyd had failed to establish a prima facie case under either state or federal law. Because the state appellate court recognized the difference between the two standards, and affirmed the trial court under both, its determination deserved deference.

[4] In *Johnson,* the Supreme Court emphasized that the threshold for making a prima facie *Batson* claim is quite low. **[5]** In *Miller-El II*, the Court made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims. **[6]** Federal habeas corpus petitioners cannot rely on new constitutional rules of criminal procedure that took effect after their convictions became final. The court of appeals was convinced that *Johnson* and *Miller-El II* merely clarified *Batson* and did not establish new rules of criminal procedure. **[7]** *Johnson* discussed the standard that *Batson* first established. **[8]** *Miller-El II* only clarified the extant *Batson* three-step framework.

[9] At the first *Batson* step, when a defendant raises a plausible *Batson* claim, a court must analyze the context in which the contested peremptory strike arose. **[10]** The facts suggested that Boyd's *Batson* claim was at least plausible, and the court should consider context in order to determine whether

Boyd raised an inference of discrimination.

[11] The court of appeals was stymied in considering Boyd's *Batson* claim in light of the "totality of the relevant facts" by the California courts' refusal to provide an entire voir dire transcript to Boyd. [12] The court of appeals recognized that its previous reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis on appeal. [13] The court of appeals did not hold that comparative juror analysis always is compelled at the appellate level. But, comparative juror analysis is an important tool that courts should use on appeal. [14] This analysis is called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the *Batson* analysis. [15] It had to be concluded that all defendants, including those who are indigent, have a right to have access to the tools that would enable them to develop their plausible *Batson* claims through comparative juror analysis. [16] It had to be held that, in light of Boyd's plausible *Batson* claim, the California appellate courts' denial of his request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law.

[17] Under *Apprendi* v. *New Jersey,* 530 *U.S. 466* (2000), other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. [18] The Ninth Circuit has held that the prior conviction exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. Consequently, the Ninth Circuit does not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily the Ninth Circuit does not allow sentencing enhancements based on such adjudications. [19] California courts disagree with the Ninth Circuit, concluding that *Apprendi*

does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. Likewise, the Third and Eighth Circuits have held *Apprendi* prior conviction exception includes nonjury adjudications, which can be used to enhance a defendant's sentence. To date, the Supreme Court has not resolved the conflict. **[20]** In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But, in the face of authority that was directly contrary to the Ninth Circuit's, and in the absence of explicit direction from the Supreme Court, the Ninth Circuit could not hold that the California courts' use of Boyd's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent. **[21]** The judgment of the district court had to be affirmed in part, reversed in part, and remanded in part, with instructions to enter a conditional writ of habeas corpus.

COUNSEL

Mark E. Eibert, Half Moon Bay, California, for the petitioner-appellant.

Glenn R. Pruden, Deputy Attorney General, State of California, San Francisco, California, for the respondent-appellee.

ORDER

The Amended Opinion filed on June 26, 2006, slip op. at 7011, and published at 455 F.3d 897 (9th Cir. 2006), is amended as follows:

On slip opinion page 7032, line 20, after the sentence ending "entire voir dire transcript" add:

> A transcript of the complete voir dire, as distinct from a partial transcript up to the time of the *Batson* motion is proper because comparative juror analysis is appropriate both at the time of the *Batson* motion and in light of all subsequent voir dire testimony. See *Wade*, 202 F.3d at 1198 (examining the complete voir dire transcript and holding that "we do not believe that the only relevant time at which to assess the would-be prima facie case is the time of the challenge); *see also Miller-El II*, 125. Ct. at 2330 (examining the prosecutor's behavior both before and after the initial Batson motion).

On slip opinion page 7032, at the end of the second full paragraph, add "This conclusion is consistent with the court's recent en banc decision in *Kesser v. Cambra*, No. 02-15475, 2006 WL 2589425, at *8-*9 (9th Cir. Sept. 11, 2006) (en banc)."

On slip opinion page 7034, replace the final paragraph with the following:

> AFFIRMED in part; REVERSED and REMANDED in part, with instructions to enter a conditional writ of habeas corpus, ordering Mobassa Boyd's release unless the State provides to him, without charge, a complete voir dire transcript within a reasonable period of time, after which he may renew his Batson claim in the district court.

With these amendments, the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judges Graber and Fisher have voted to deny the petition for rehearing en banc and Judge Cudahy has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or petitions for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge

The California courts denied a *Batson*[32] motion made by Petitioner Mobassa Boyd and denied his request for a free transcript of the entire voir dire for use on appeal. We must ask whether those rulings were contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court. In an earlier decision in this case, we answered "no." *Boyd* v. *Newland,* 393 F.3d 1008 (9th Cir. 2004). In response to a petition for rehearing and in light of recent Supreme Court cases clarifying *Batson* v. *Kentucky,* 476 U.S. 79 (1986), we conclude that our earlier analysis was flawed. We now hold that the California appellate courts violated clearly established federal law by denying Petitioner's habeas petition because, without an entire voir dire transcript, those courts could not evaluate the relevant circumstances surrounding the contested strike, as *Batson* requires. In that respect we reverse and remand with instructions to grant the petition for a writ of habeas corpus.

Petitioner also argues that the California courts erred by enhancing his sentence because of a nonjury juvenile adjudication. As in our earlier decision, we disagree and, in this respect, affirm.

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[32] *Batson v. Kentucky*, 476 U.S. 79 (1986).

FACTUAL AND PROCEDURAL HISTORY

Petitioner Mobassa Boyd is African-American. He was charged in California with unlawfully possessing a firearm after having previously suffered a juvenile adjudication for a felony, Cal. Penal Code § 12021(e), and with unlawfully possessing a sawed-off shotgun, *id.* § 12020(a)(1).

During voir dire, the prosecutor used a peremptory strike to excuse an African-American prospective juror. Petitioner's counsel made a *Batson* motion, asserting that the strike was race-based.[33] At the time of the disputed peremptory challenge, another African-American potential juror had been stricken for cause; two other African-Americans remained as potential jurors; and the prosecutor had used two other peremptory challenges on non-African-American jurors. The trial court denied the motion, finding that Petitioner's "showing falls short of showing a prima facie case" of racial bias in the prosecutor's use of the peremptory challenge.

The jury that eventually was empaneled convicted Petitioner. Petitioner waived his right to have a jury determine the truth of his prior juvenile adjudication. The trial court found the juvenile adjudication to be true and, accordingly, increased Petitioner's sentence from three to six years. Cal. Penal Code § 667(d)(3), 1170.12(b)(3).

Petitioner filed three requests to supplement the record to include the entire voir dire transcript. The California Court of

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[33] Petitioner's counsel challenged the peremptory strike under *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). *Wheeler* prohibits, under the California Constitution, the use of racially motivated peremptory challenges. *Id.* at 761-62. A *Wheeler* motion serves as an implicit objection under *Batson*, *People v. Yeoman*, 72 P.3d 1166, 1187-88 (Cal.2003), so Petitioner preserved his federal constitutional claim. Accordingly, we refer to counsel's objection as a *Batson* motion.

Appeal granted Petitioner's requests in part and required that he be provided the voir dire of the excused African-American juror plus his counsel's argument under *Batson*. But the court of appeal denied Petitioner's requests for the entire voir dire transcript because it concluded that he did not comply with a California local rule that requires a defendant to "establish with some certainty how the requested materials may be useful on appeal." Cal. Ct. App., First App. Dist. Local Rule 6(d) (2003). The court also relied on controlling California precedent, which does not require a court to provide a defendant with an entire voir dire transcript free of charge. *See People v. Landry*, 56 Cal. Rptr. 2d 824, 828 (Ct. App. 1996) (holding that when the purpose of the request is to compare the testimony of jurors, but no such comparison was made at the trial level, a court need not provide a free voir dire transcript).

On direct appeal to the California Court of Appeal, Petitioner challenged the denial of his *Batson* motion. The court of appeal affirmed Petitioner's conviction, and the California Supreme Court denied his petition for review without comment.[34] After exhausting state-court post-conviction procedures without success, Petitioner petitioned for a writ of habeas corpus in federal district court. The district court denied his petition. Petitioner now appeals to us.

STANDARD OF REVIEW

We review de novo a denial of a petition for habeas corpus. *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

We may not disturb a state court's determination unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

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[34] Under AEDPA, we review the last reasoned state-court decision. *Brodit v. Cambra*, 350 F.3d 985, 987 (9th Cir. 2003). Accordingly, we examine the California Court of Appeal's decision here.

DISCUSSION

A.Batson *Claim*

[1] To succeed on his charge of racial bias, Petitioner first must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 93-94; *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999) (en banc). He must show that (1) the prospective juror is a member of a "cognizable racial group," (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motived by race. *Batson*, 476 U.S. at 96; *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001). If he failed to establish a prima facie case, then the motion properly was denied; the prosecutor need not have provided a race-neutral explanation for the strike. *Batson*, 476 U.S. at 96-97; *Cooperwood*, 245 F.3d at 1046.

[2] The first and second elements of the test are met, because the prospective juror is African-American, and the prosecutor used a peremptory strike to remove the juror. Only the third element of the prima facie case is at issue, that is, whether the state court erred in failing to recognize an inference of racial motivation.

Petitioner first argues that the California Court of Appeal's decision was "contrary to" federal law, 28 U.S.C. § 2254(d)(1), because the court used an incorrect legal standard in determining whether he had made out a prima facie case. If he were correct, we would not defer to the state court. *See Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000) (holding that when the state court uses the wrong legal standard, the rule of deference does not apply). But we read the state court's decision differently.

In affirming the trial court's ruling on the peremptory strike, the California Court of Appeal wrote that Petitioner had not shown a "strong likelihood" that the prosecutor's challenge had been motivated by racial considerations. The "strong likelihood" wording originates from *Wheeler*, the California equivalent of *Batson*, and the *Wheeler* standard impermissibly places on the defendant a more onerous burden of proof than that required by the "raise an inference" standard of *Batson*. *See Johnson v. California*, 125 S. Ct. 2410, 2413-14 (2005) (agreeing with the Ninth Circuit that the *Wheeler* standard, which requires a petitioner to show that a peremptory challenge more likely than not was based on impermissible group bias, is more demanding than the standard enunciated in *Batson*, and therefore violates the Constitution); *Wade*, 202 F.3d at 1192 ("We hold that the *Wheeler* standard, as currently interpreted by the California courts, does not satisfy the constitutional requirement laid down in *Batson*.").

[3] But the California court did not stop there. It also held that Petitioner "clearly did not establish a prima facie case of group discrimination, even under federal precedent." In other words, the court of appeal did not rely only on the *Wheeler* standard, instead holding that Petitioner had failed to establish a prima facie case under either state or federal law. Because the court of appeal recognized the difference between the two standards, and affirmed the trial court under both, its determination deserves deference. *See Tolbert*, 182 F.3d at 682-83 (describing deference owed to state court's prima facie determination under *Batson*).

Petitioner also argues that the California courts were wrong to conclude that he failed to establish a prima facie case under *Batson*. We previously held that Petitioner did not make a prima facie case of purposeful discrimination. Boyd, 393 F.3d at 1013. Shortly after we published our decision, however, the Supreme Court issued two opinions dealing with the application of *Batson* to peremptory challenges: *Johnson v. California*, 125 S. Ct. 2410 (2005), and *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) (*Miller-El II*).[35] We asked the parties for the additional briefing to discuss the implications of those decisions for this case. After further consideration, we now conclude that our previous opinion misunderstood *Batson* and that, without an entire voir dire transcript, the California appellate courts could not have considered the circumstances surrounding the contested strike, could not have evaluated the potential inference of racial bias, and therefore could not properly have found that Petitioner failed to establish a prima facie case.

[4] In *Johnson,* the Supreme Court reviewed the level of proof necessary to establish a prima facie case of discrimination under the first step of *Batson.* 125 S. Ct. at 2416. In *Johnson,* the prosecution used three of its 12 peremptory challenges to strike the only African-American prospective jurors from the pool. *Id.* at 2414. Defense counsel made *Batson* motions after the second and third strikes against African-American prospective jurors. After the latter *Batson* motion, the trial court

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35. This is not the first time that the Supreme Court granted certiorari in that case. In *Miller-El v. Cockrell*, 537 U.S. 322, 325-27 (2003) (*Miller-El I*) the Supreme Court reviewed the petitioner's challenge to the denial of his request for a certificate of appealability ("COA") so that he could pursue habeas corpus relief based on a claim of group bias in jury selection. At Miller-El's trial, the prosecution used peremptory strikes against 10 of 11 African-American prospective jurors. *Id.* at 326. Miller-El's trial predated *Batson*, but by the time he filed his federal habeas motion. *Batson* was well entrenched. *Id.* at 327. The Fifth Circuit refused to grant a COA, concluding that the petitioner had failed to establish a viable claim of constitutional error. *Id.* at 348. After a remand, the Fifth Circuit denied Miller-El's habeas petition on the merits. The Supreme Court again granted certiorari in *Miller-El II*, to consider whether the circuit court's decision was correct

concluded that, although the situation was "very close," the defense had not established a prima facie case of racial bias. *Id.* The Supreme Court reversed, emphasizing that the threshold for making a prima facie *Batson* claim is quite low:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to precinct the trial judge to draw an inference that discrimination has occurred.

Id. at 2417.

[5] On the same day, the Supreme Court also decided *Miller-El II.* In *Miller-El II*, the Court used comparative juror analysis at the appellate level to determine whether the prosecution had been motivated by racial bias in exercising its peremptory strikes. 125 S. Ct. at 2325-38. "Comparative juror analysis" refers, in this context, to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group. *See, e.g., id.* (engaging in comparative juror analysis); *Mitleider v. Hall*, 391 F.3d 1039, 1049 n.9 (9th Cir. 2004) (conducting a comparative juror analysis to discern whether differing life experiences justified the use of a peremptory strike against an African-American juror in a case in which a prima facie showing had been made), *cert. denied*, 125 S. Ct. 2968 (2005). *Miller-El II* made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however,

are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." 125 S. Ct. at 2325.

[6] Both *Johnson* and *Miller-El II* were decided after Petitioner's conviction became final. The government has argued that even if *Miller-El II* requires or encourages comparative juror analysis on appeal, its rule cannot apply to the case at hand under *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that federal habeas corpus petitioners cannot rely on new constitutional rules of criminal procedure that took effect after rules of criminal procedure that took effect *after* their convictions became final. *Id.* at 310.[36] Because the government argues that Petitioner is requesting the benefit of a rule decided after his original appeal was decided, and thus after his conviction became final, we must address *Teague* before turning to the merits of his claim. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). We are convinced that *Johnson* and *Miller-El II* merely clarify *Batson* and do not establish new rules of criminal procedure.

[7] *Johnson* discusses the standard that *Batson* first established. The *Johnson* opinion relies almost exclusively on the wording used in the *Batson* opinion; we have concluded that Johnson explains *Batson*, *see Yee v. Duncan*, 441 F.3d 85 1, 857 n.9 (9th Cir. 2006) (noting that Johnson is "an example of the Supreme Court's consistent interpretation of *Batson* to date" but not deciding the *Teague* issue); and the state does not contend that *Johnson* established a new rule, *see Caspari*, 510 U.S. at 389 (noting that if the state does not argue that *Teague* applies, a court need not consider it).

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[36] There was no majority opinion, in *Teague*. However, the Court has treated Justice O'Connor's plurality opinion as embodying its holding. *See, e.g.*, *Tyler v. Cain*, 533 U..S. 656, 665 (2001).

[8] Neither does *Miller-El II* create a new rule of criminal procedure. Instead, it simply illustrates the means by which a petitioner can establish, and should be allowed to establish, a *Batson* error. *See Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005) (stating that in *Miller-El II*, the Court did not announce "any new elements or criteria for determining a *Batson* claim" but merely applied *Batson* in the circumstances of that particular case), *cert. denied*, 126 S. Ct. 1028 (2006). *Miller-El II* fits within the *Batson* framework, which provides that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. *Batson* itself required courts to consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Id.* at 94, 96. Moreover, we are persuaded that the opinion's support of comparative juror analysis on appeal did not create a new rule because the Supreme Court applied the rule to Miller-El himself. The *Teague* rule applies to the Supreme Court as well as to lower courts. *See Sawyer v. Smith*, 497 U.S. 227, 239 (1990) (affirming the lower court's refusal to apply the holding of one of the Court's previous opinions to a defendant because the rule established in that case was new). Therefore, if the Supreme Court's endorsement of comparative juror analysis on appeal constituted a new procedural rule, the Court would not have applied that rule to Miller-El, whose case came before the Court on an appeal from a denial of habeas corpus. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004). Because the Court did engage in extensive comparative juror analysis, we can infer that *Miller-El II* must only have clarified the extant *Batson* three-step framework. *See Frazer v. South Carolina*, 430 F.3d 696, 704-06 (4th Cir. 2005) (concluding that an earlier Supreme Court case did not establish a new rule because, procedurally, the case reached the Court on a challenge to a denial of habeas corpus but the Court addressed the merits of the petitioner's claim and remanded for further proceedings, which it could not have done under *Teague* if it were creating a new rule).

[9] Accordingly, we now turn to the merits of Petitioner's *Batson* claim. In order to determine, at the first *Batson* step, whether racial bias motivated a prosecutor's decision to remove a potential juror, a court must consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Batson*, 476 U.S. at 94, 96. Thus, when a defendant raises a plausible *Batson* claim, a court must analyze the context in which the contested peremptory strike arose. *See Johnson*, 125 S. Ct. at 2419 (reversing the state court's denial of habeas corpus because all three of the African-American prospective jurors were stricken and the state court judges found the circumstances suspicious). In our earlier *Boyd* opinion, we misread *Batson* to require more certainty of discriminatory motive.

[10] In this case, it is clear that the Petitioner raised at least a plausible *Batson* claim and that contextual analysis is therefore appropriate. After the prosecutor used a peremptory challenge to strike an African-American juror (Petitioner is of the same race), Petitioner's counsel objected, arguing that this was the second African-American juror removed for cause), there remained only two potential African-American jurors in the pool, and nothing in the struck juror's voir dire responses intimated a legitimate basis for removal. These facts, though not alone sufficient to establish a prima facie case, suggest that Petitioner's *Batson* claim was at least plausible, and the court should consider context in order to determine whether Petitioner has raised an inference of discrimination. *See Johnson*, 125 S. Ct. at 2417.

[11] There are two main ways that we could consider Petitioner's *Batson* claim in light of the "totality of the relevant facts." *Batson*, 476 U.S. at 94. But, for both of them, we are stymied by the California courts' refusal to provide an entire voir dire transcript to Petitioner.

First, we could look at percentages. Here, the prosecution used its third peremptory strike to dismiss an African-American prospective juror. The first two peremptory strikes were used against prospective jurors who were not African-American. We have held that, "[t]o establish a prima facie case, [a petitioner does] not need to show that the prosecution ha[s] engaged in a pattern of discriminatory strikes against more than one prospective juror" because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Nonetheless, in some cases, courts have found it helpful to compare the number of minority prospective jurors stricken to non-minority prospective jurors stricken. *See Miller-El II*, 125 S. Ct. at 2325 (noting that "[t]he numbers describing the prosecution's use of peremptories are remarkable."); *Wade*, 202 F.3d at 1198 (reviewing the statistical evidence of the number of African-American potential jurors stricken compared to the racial makeup of the other potential jurors who were struck and of the pool at large, although noting that statistical disparities can be misleading).

We know only that the prosecutor used a peremptory strike to remove one African- American juror and that two other African-American prospective jurors remained in the pool at that time. Because the state courts did not furnish a complete voir dire transcript to Petitioner, who is indigent, we lack the additional data that would allow the kind of statistical analysis that both the Supreme Court and this court have performed in the past.

Second, we could assess "all relevant circumstances," *Batson*, 476 U.S. at 96, surrounding the challenged peremptory strike by engaging in comparative juror analysis. To support his claim, Petitioner contends here, as did his trial counsel in the first instance, that no nonracial reason existed for the peremptory challenge. In order to assess Petitioner's claim, we must compare the prospective juror who was stricken with the other prospective jurors who were not.

[12] In our first *Boyd* opinion, we held that *Batson* does not compel a court to conduct comparative juror analysis for the first time on appeal. *Boyd*, 393 F.3d at 1015. We looked to California cases that require a petitioner to preserve the issue at trial, in order for a court to consider comparative juror analysis on appeal. *See, e.g., People v. Johnson*, 71 P.3d 270, 285 (Cal. 2003) (noting that the court maintains its "longstanding practice" of refusing to engage in comparative juror analysis for the first time on appeal), *rev'd on other grounds*, *Johnson*, 125 S. Ct. 2410. But after *Miller-El II*, we recognize that our previous reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis on appeal. In *Miller-El II*, the prosecution used 10 of its peremptory challenges to strike African-American jurors, leaving only one African-American juror in the pool. 125 S. Ct. at 2325. After Miller-El was convicted, but while his appeal was pending, the Supreme Court decided *Batson*. *Id*. at 2346 (Thomas, J., dissenting). The state court of appeals remanded the case for a *Batson* hearing, where defense counsel presented some evidence about the jurors who were struck and the government was forced to explain its strikes. *Id.*

[13] The Supreme Court, though, looked beyond the evidence that Miller-El had presented to the trial court and conducted a comprehensive comparative juror analysis on appeal. *Id*. at 2325-38 & 2326 n.2. Accordingly, the California courts' view that comparative juror analysis can take place on appeal only when the trial court engaged in such analysis in the first instance has been called into question:

> Defendant asks us to examine the responses of jurors other than Juror T. [,the African-American juror struck,] in determining whether the trial court erred in finding that defendant failed to establish a prima facie case of group bias. In earlier cases we explained that, although such an examination is appropriate at the trial court level when the issue is properly brought to that court's attention, such an examination for the first time on appeal is unreliable. Defendant urges reconsideration of these cases in light of the high court's decision in *Johnson*, in which the court did not comment upon whether comparative analysis should be undertaken for the first time on appeal, and another decision issued the same day, *Miller-El* [II], in which the court employed comparative juror analysis in circumstances in which it was undisputed that a prima facie case had been made. Assuming without deciding that a comparative juror analysis should be undertaken under the circumstances presented [in which the trial court found that the defendant failed to make a prima facie case], we conclude [that] defendant's proffered analysis fails to establish a prima facie case of group bias.

People v. Cornwell, 117 P.3d 622, 635 (Cal. 2005) (citations omitted), *cert. denied*, 126 S. Ct. 1432 (2006). Like the various California courts to address the issue, we do not hold that comparative juror analysis always is compelled at the appellate level. *See, e.g., People v. Ward*, 114 P.3d 717, 728 (Cal. 2005) (declining to decide whether *Miller-El II* requires comparative juror analysis on appeal, but concluding that even if it did, such an analysis did not support the defendant's claim that the prosecution's peremptory strikes were motivated by racial bias), *cert. denied*, 126 S. Ct. 1625 (2006). But, comparative juror analysis is an important tool that courts should use on appeal.

[14] Moreover, because comparative juror analysis assists a court in determining whether the totality of the circumstances gives rise to an inference of discrimination, we believe that this analysis is called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the *Batson* analysis. Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either step one or step three of *Batson* was unreasonable in light of Supreme Court precedent. In *Miller-El II*, the trial court concluded that the defendant had made a prima facie case and had asked the prosecution to provide race-neutral reasons for the strikes. 125 S. Ct. at 2323. The Court, on review, at the third *Batson* step considered the written and oral statements made by all the prospective jurors and the prosecution's stated reasons for dismissing the African-American jurors to determine whether race played a role in the prosecution's use of its peremptory strikes. *Id.* at 2325-38.

Some California courts have questioned whether comparative juror analysis is similarly appropriate at the first *Batson* step, where the prosecution has not voiced its rationales for the strikes, instead of at the third *Batson* step. *See, e.g., People v. Gray*, 118 P.3d 496, 511 (Cal. 2005) ("*Miller-El [II]* thus did not consider whether an appellate court must conduct a comparative juror analysis in the first instance, when the objector has failed to make a prima facie showing of discrimination, or whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial."), *petition for cert. filed*, ____U.S.L.W. ___ (U.S. Feb. 23, 2006) (No. 05-9564); *People v. Guerra*, 129 P.3d 321, 351 (Cal. 2006) ("Performing a comparative analysis is problematic when, as here, the prosecutor did not provide reasons for the challenge because the trial court found no prima facie case had been established."). We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.

In *Miller-El II*, the Supreme Court did not merely review the reasons that the prosecutor gave for peremptorily striking the African-American jurors; instead it also considered the voir dire questions that the prosecutor had posed to the various jurors. 125 S. Ct. at 2333-38. The Court concluded that the prosecutor asked different questions of minority prospective jurors from those it asked of nonminority prospective jurors in order to elicit different responses, which could then justify a peremptory strike on purportedly nonracial grounds. *Id.* at 2337. In some circumstances, a court may have to review the questions that the prosecution asked of jurors at step one of the *Batson* analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination. There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*. *Cf. United States v. Esparza-Gonzalez*, 422 F.3d 897, 904-05 (9th Cir. 2005) (engaging, on direct review, in comparative juror analysis to hold that the defendant established a prima facie case of intentional unlawful discrimination).

Further, both *Johnson* and Miller-El II suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes. If a trial court's conclusion that a defendant failed to make a prima facie case could insulate from review a prosecution's use of peremptory strikes, the holdings of those Supreme Court opinions would be undermined.

[15] But we can engage in no comparative juror analysis here, because we do not know what happened during the entirety of the voir dire. Because we hold that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim, we also must conclude that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis.

"[T]he State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The Supreme Court has held that indigent defendants must be provided with various portions of the trial transcript. *See, e.g.*, *id.* at 228 (stating that the transcript of a prior mistrial ordinarily can be assumed to be valuable to a defendant, although ultimately finding no error because an alternative to the transcript existed); *Williams v. Oklahoma City*, 395 U.S. 458, 458-59 (1969) (per curiam) (finding constitutional error where the state provided no trial transcript to an indigent defendant on appeal); *Gardner v. California*, 393 U.S. 367, 370-71 (1969) (holding that the indigent defendant had to be provided with a transcript of an evidentiary hearing from his original trial, so that he could file a new habeas petition); *Long v. Dist. Court of Iowa*, 385 U.S. 192, 192-94 (1966) (per curiam) (holding that a court's failure to provide a defendant with any portion of a habeas transcript was error). We recognize that the Court has never explicitly held that an indigent defendant is entitled to an entire voir dire transcript as of right, but *Miller-El II* makes comparative juror analysis a centerpiece of the *Batson* analysis, and that analysis cannot be done in the absence of a voir dire transcript. Accordingly, the state court's refusal to provide Petitioner with the whole voir dire transcript, in the face of a plausible *Batson* claim, involved an unreasonable application of clearly established Supreme Court precedent.

In denying, in part, Petitioner's request for an entire voir dire transcript, the state courts relied on a California rule that requires an indigent defendant to "establish with some certainty how the requested materials may be useful on appeal" before it will provide a transcript free of charge.[37] Petitioner argues that the rule is unconstitutional because it places him in the untenable position of having to establish how the entire transcript would be helpful to him, without having access to the transcript to make such a showing.

We do not agree that local rule 6(d) violates the Constitution. The Supreme Court has upheld a federal statute that is similar to California's local rule 6(d). In *United States v. MacCollom*, 426 U.S. 317, 322-23 (1976) (plurality opinion), the Court concluded that a statute requiring a judge to make a finding that a habeas petition is not frivolous and that a transcript is needed, before providing an indigent defendant with a trial transcript, does not violate the United States Constitution. In short, the California rule requiring an indigent defendant to show a specific need to obtain a complete voir dire transcript does not run counter to clearly established federal law.

The state court's error was simply in holding that an indigent defendant who raised a plausible *Batson* claim had failed to "establish with some certainty how the requested" voir dire transcript could help him on appeal, pursuant to local rule 6(d). *Batson* and its progeny explain why, as a matter of Supreme Court law, such a transcript may be useful on appeal.

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[37] In pertinent part, the rule provides:

> A motion to augment the reporter's transcript shall identify the portion of the record with specificity, including the reporter and date of hearing. It shall establish with some certainty how the requested materials may be useful on appeal. Requests for jury voir dire should specify the exact questioning by which counsel of which juror together with the reason justifying the request.

Cal. Ct. App., First App. Dist. Local Rule 6(d).

[16] In summary, under Supreme Court precedent the burden for making a prima facie case is not an onerous one. *Johnson*, 125 S. Ct. at 2417. When an appellate court must decide whether the trial court that denied a *Batson* motion should instead have drawn "an inference that discrimination . . . occurred," *id.* at 2419, *Batson* supports the use of comparative juror analysis, *Miller-El II*, 125 S. Ct. at 2325-38. A reviewing court cannot examine the "totality of the relevant facts" and "all relevant circumstances," *Batson*, 476 U.S. at 94, 96, surrounding a prosecutor's peremptory strike of a minority potential juror without an entire voir dire transcript. A transcript of the complete voir dire, as distinct from a partial transcript up to the time of the *Batson* motion, is proper because comparative juror analysis is appropriate both at the time of the *Batson* motion and in light of all subsequent voir dire testimony. *See Wade*, 202 F.3d at 1198 (examining the complete voir dire transcript and holding that "we do not believe that the only relevant time at which to assess the would-be prima facie case is the time of the challenge"); *see also Miller-El II*, 125 S. Ct. at 2330 (examining the prosecutor's behavior both before and after the initial *Batson* motion). We do not hold that Petitioner has satisfied his burden of establishing a prima facie showing of unlawful discrimination under *Batson*'s first step. Rather, we hold that, in light of Petitioner's plausible *Batson* claim, the California appellate courts' denial of Petitioner's request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law. This conclusion is consistent with the court's recent en banc decision in *Kesser v. Cambra*, No. 02-15475, 2006 WL 2589425, at *8-*9 (9th Cir. Sept. 11, 2006) (en banc).

B. *Nonjury Juvenile Adjudication*

[17] Finally, Petitioner contends that the state court violated clearly established federal law by using a nonjury juvenile adjudication to increase his sentence from three to six years. In

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) Petitioner argues that a juvenile adjudication does not qualify as a "conviction" under the *Apprendi* exception.

[18] We have held that the Apprendi "prior conviction" exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001). Consequently, we do not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications. *Id.* at 1194-95.

[19] California courts disagree with *Tighe*. They conclude that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender. *See, e.g., People v. Bowden*, 125 Cal. Rptr. 2d 513, 517 (Ct. App. 2002) ("[T]he *Tighe* majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context of the Three Strikes law."). *But see People v. Smith*, 1 Cal. Rptr. 3d 901,907-29 (Ct. App. 2003) (Johnson, J., concurring in part and dissenting in part) (relying on *Tighe* to argue against the use of a prior nonjury juvenile conviction to enhance a defendant's sentence). Likewise, the Third, Eighth, and Eleventh Circuits have held that the *Apprendi* "prior conviction" exception includes nonjury juvenile adjudications, which can be used to enhance a defendant's sentence. *United States v. Burge*, 407 F.3d 1183, 1190-91 (11th Cir.) (holding that a juvenile adjudication may be used as a "prior conviction" for *Apprendi* purposes), *cert. denied*, 126 S. Ct. 551 (2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (stating that "we find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court . . . , that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence"); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) ("We therefore conclude that juvenile adjudications can rightly be characterized as 'prior convictions' for *Apprendi* purposes, and that the district court did not err in increasing [the defendant's] sentence based on his prior juvenile adjudications."); *cf.* Note, *Constitutional Law-Right to Jury Trial-Eighth Circuit Holds an Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purposes of Sentence Enhancement at a Subsequent Criminal Proceeding,* 116 Harv. L. Rev. 705, 708 (2002) (comparing various circuits' approaches and suggesting that "*Tighe*'s understanding of the jury trial right is more consistent with the implications of the Supreme Court's recent jury trial jurisprudence"). To date, the Supreme Court has not resolved the conflict.

[20] Although we are not suggesting that *Tighe* was incorrectly decided, as some of these varying interpretations of *Apprendi* suggest, the opinion does not represent clearly established federal law "as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(l). In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. *See Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999) (stating that Ninth Circuit case law may be used to help determine clearly established federal law). But, in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.

[21] AFFIRMED in part; REVERSED AND REMANDED in part, with instructions to enter a conditional writ of habeas corpus, ordering Mobassa Boyd's release unless the State provides to him, without charge, a complete voir dire transcript within a reasonable period of time, after which he may renew his *Batson* claim in the district court.